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No. 05-1480

In The

Supreme Court of the United States

CITY OF PORTLAND, OREGON, a municipal corporation; and PIONEER COURTHOUSE SQUARE OF PORTLAND, INC., an Oregon nonprofit corporation,

Petitioners,

v.

EDWARD GATHRIGHT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a private individual or entity that obtains a permit to hold an expressive event in a City park, to which it generally invites the public, have a right, protected by the First Amendment, to control the message conveyed at the event?

2. By creating a false dichotomy between "participating in" and "attending" an event held in a City park under a permit, did the Ninth Circuit misinterpret and misapply this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)?

3. If a permit for an event, issued by the City parks authority, contains a provision that allows the permit holder to evict individuals from the event, may the City, consistent with the First Amendment, assist in the enforcement of the permit holder's decision to evict an individual from the event, if the permit holder's decision is based on the person's speech?

4. What limits does the First Amendment place on the authority of municipalities and their permit holders to manage and control the behavior of individuals at permitted events in City parks, when the individuals are engaged in loud, aggressive, abusive, disruptive or unwelcome speech?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Ninth Circuit and in the United States District Court for the District of Oregon were:

Petitioners – The Petitioners are the City of Portland, a municipal corporation organized and existing under the laws of the State of Oregon, and Pioneer Courthouse Square of Portland, Inc., an Oregon non-profit corporation. Petitioners were defendants in the District Court, and were appellants before the Ninth Circuit.

Respondent – Respondent is Edward Gathright, an individual. Respondent was the plaintiff in the District Court, and was the appellee before the Ninth Circuit.

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OPINIONS BELOW

The decision which petitioners seek to have this Court review is reported as *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006). The district court's opinion, which was affirmed by the Ninth Circuit, is reported as *Gathright v. City of Portland*, 315 F. Supp. 2d 1099 (D. Or. 2004). The district court's Order modifying its injunction, which was vacated and remanded by the Ninth Circuit, is not reported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its decision in this case on February 24, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the Ninth Circuit by writ of certiorari. This petition is timely under 28 U.S.C. § 2101 and under Rule 13.1 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, statutes and ordinances, which are set out in the Appendix:

1. United States Constitution, Amendment I
2. 42 U.S.C. § 1983
3. Oregon Revised Statutes, §§ 164.205, 164.245
4. Oregon Revised Statute, § 166.025

5. Code of the City of Portland, Oregon, (P.C.C.) Chapter 20.08

6. *Former* P.C.C. § 20.08.060

7. P.C.C. § 20.12.240

STATEMENT OF THE CASE

1. Introduction

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, (1995), this Court held that the application of Massachusetts' Public Accommodation Law to require a private entity, that obtained a permit to hold a parade on City streets, to include in the parade a group, whose message it did not want to include, violated the entity's First Amendment right to control the message at the event. In this case, the principal question petitioners ask the Court to decide is whether the First Amendment right of permit holders to control the message at their events, which the Court recognized in *Hurley*, extends to private individuals and entities who obtain permits to hold expressive events in City parks. In *Hurley*, the permit holder's constitutionally protected right was in conflict with a purely statutory right asserted by the rejected group. In this case, the permit holders' First Amendment rights must be assessed in the context of the First Amendment right that individual members of the public otherwise would have to engage in free speech and expression in public parks.

2. Factual Background

The City of Portland maintains a system of parks "for the recreation of the public and the greatest possible use is encouraged, subject only to such regulation as will preserve the Parks for the purposes for which they are laid out and the enjoyment, convenience, and safety of all concerned." Code of the City of Portland, Oregon (P.C.C.) § 20.04.020. Permits are required for a variety of activities in the City parks, including activities at which the "person or persons engaged in the activity seek to exclude, or to have the right to exclude, any member of the public from the activity or from any Park or from any area of any Park." P.C.C. § 20.08.010(D).

This case involves events at two of the City's parks, Governor Tom McCall Waterfront Park ("Waterfront Park"), and Pioneer Courthouse Square. Use of Waterfront Park for events is governed by a written City policy, called the "User's Guide for Major Parks." As a part of this policy, the permittee's designated representatives are "persons in charge" under Oregon law over the area designated by the permit for the time period designated by the permit, and, as such, are authorized to evict and/or exclude persons from the permitted area.

Pioneer Courthouse Square is managed for the City by a private non-profit corporation, petitioner Pioneer Courthouse Square of Portland, Inc. Pioneer Courthouse Square's written permit policy similarly includes designation of persons in charge.

On May 13, 2001, Northwest Tibetan Cultural Association had an exclusive use permit for Pioneer Courthouse Square for an event known as Pathways to Peace Welcoming Festival. Patrice Thramer was the designated

"person in charge" of that event. The event involved a visit of His Holiness, the Dalai Lama, an internationally recognized religious leader, to Portland. Respondent Edward Gathright appeared at the event and was yelling and disrupting the event. Event-goers were asking him to leave and/or to be quiet. Mr. Gathright was preaching "conservative Christian doctrine," and was yelling things to the effect that the Dalai Lama was not a recognized religious figure and that he was involved in idol-worship. Ms. Thramer determined that Mr. Gathright's message clearly was contrary to the message of peace and compassion that the event was intending to convey, and asked him to leave. When he did not do so voluntarily, police officers escorted him from the middle of the Square to the sidewalk.

On June 17, 2001, Pride Northwest, Inc., had a permit for the use of a section of Waterfront Park for an event known as Pride Festival and Parade 2001. Linda Williams was designated as a "person in charge" under that permit. Pride Northwest, Inc., also had a permit for the use of the streets for its parade. The purpose of the event was to celebrate tolerance and acceptance of people who are homosexual. Mr. Gathright appeared at the Festival before the parade began and engaged in noisy and disruptive behavior. He was wearing a T-shirt with "GOT AIDS YET?" printed on the back. Mr. Gathright walked through the Festival area, carrying a bible and a small sign. The sign violated the rules the permit holder had established for the event, which prohibited signs. Mr. Gathright's message was incompatible with the message of pride and acceptance the organizers were trying to convey at the event, and with the nature and spirit of the event itself. Ms. Williams asked Mr. Gathright to leave the event area,

which he did only to return a short time later. Ms. Williams then excluded plaintiff from the event, and he left without incident.

On September 22, 2001, Cascade AIDS Project had an exclusive use permit for Pioneer Courthouse Square for an event known as AIDSWALK 2001. Cascade AIDS Project is a nonprofit corporation that provides AIDS support, in the form of information and public education about HIV/AIDS, and services to people living with AIDS. Jose Ayala was a "person in charge" for that event. Mr. Gathright appeared at the event, carrying anti-homosexual signs and loudly yelling anti-homosexual messages. Mr. Gathright had appeared at the event the previous year and had created a major disruption of the event, which was upsetting to the event attendees. Because of the disruption which plaintiff had caused at the 2000 event, which had resulted in a physical altercation, Mr. Ayala directed the event's private security to instruct Mr. Gathright to leave and to call the Portland police.

Mr. Gathright's message was inconsistent with the message of acceptance and support the AIDSWALK seeks to convey to all people living with AIDS, many of whom are homosexuals. Mr. Ayala believed that plaintiff was a threat to the safety of people attending the event. When the police arrived, Mr. Ayala told them he wanted Mr. Gathright excluded from the event. When plaintiff refused to leave, the private security arrested him, and the Portland police issued him a citation for criminal trespass in the second degree, under Oregon Revised Statutes § 164.245.

On June 16, 2002, Pride Northwest, Inc., again had a permit for the use of a section of Waterfront Park for the

Pride Festival and Parade 2002. Pride Northwest, Inc., also had a permit for the use of the streets for its parade. Again, the purpose of the event was celebration of the lesbian, gay, trans-gendered and bi-sexual communities. Mr. Gathright again appeared at the event and engaged in loud and disruptive behavior. He was yelling such things as "God hates faggots," and "Homos have AIDS." Mr. Gathright expressed his intent to stop the parade route. When he refused to leave the permit areas, Portland police arrested him and issued him a citation for criminal trespass and for failure to obey the police at an assembly.

On August 24, 2002, the Festa Italiano Association had an exclusive use permit for Pioneer Courthouse Square for an event known as Festa Italiano. The purpose of the event was to have a "party for the people of Portland to show them what the Italians are about." Harold Bob Tommaso was the "person in charge" for this event. Mr. Gathright went to the event, and, while in the area covered by the permit, engaged in preaching. Mr. Tommaso determined to exclude Mr. Gathright from the event "due to his preaching." Two Portland police officers told Mr. Gathright that, while they believed they did not have the authority as police officers to exclude him from Pioneer Courthouse Square for preaching during a permitted event, they did have the authority and obligation to enforce Mr. Tommaso's decision as the organizer's "person in charge" to exclude him. The police ordered Mr. Gathright to leave or be arrested for trespass. He left the Square "under direct threat of arrest for trespass."

On September 11, 2002, the United Way of the Columbia-Willamette had an exclusive use permit for Pioneer Courthouse Square for an event known as 911 Community Day: Evening of Remembrance. The purpose of the event

was to commemorate the anniversary of the tragic events of September 11, 2001, to honor and remember those lost in the tragedies of September 11, 2001, and to register people to volunteer as part of an effort at building communities locally. Tammi Olund was the "person in charge" for this event. The event was a family-oriented event, which included performances in the Square. Mr. Gathright appeared at the event before the performances began. He was carrying very graphic anti-abortion signs, depicting images of aborted fetuses. Mr. Gathright was very loudly yelling messages to the effect of "abortion is baby killing." Event-goers were agitated by his conduct, and scuffles were beginning to break out between him and them. Ms. Olund was worried for the safety of those at the event. Ms. Olund further was concerned because plaintiff's message was incompatible with the message of remembrance that the permit holders were trying to convey at the event, and with the nature and spirit of the event itself. Ms. Olund felt it was inappropriate to subject the children of the Portland Philharmonic Youth Choir, who were about to perform at the event, to plaintiff's "graphic images." With the assistance of two private security officers and a Portland police officer, plaintiff was convinced to move his protest across the street.

The full course of the judicial proceedings in this case is described under the appropriate heading below. However, on April 6, 2004, on Mr. Gathright's motion, the United States District Court for the District of Oregon, the Honorable Ancer L. Haggerty, United States District Judge, entered a permanent injunction, which prohibited petitioners "from removing [Mr. Gathright] and others similarly situated from an area outside or inside of the boundaries under the control of an event permit unless

there is probable cause to believe that they have violated a duly enacted statute or ordinance." In the months following entry of that injunction (which is part of the subject of this petition), Mr. Gathright had two more interactions with permit holders and the Portland police.

Mr. Gathright and other preachers attended the Pride Northwest Parade and Festival on June 20, 2004, both on the parade route (*i.e.*, in the street area) and at the festival site (*i.e.*, inside Waterfront Park). Portland Police Officer Barnum saw Mr. Gathright insulting members of the crowd gathered along the parade route, yelling derogatory comments at them. Based on the effect Mr. Gathright's insults were visibly having on the members of the crowd, Officer Barnum responded to what he perceived to be the imminent threat of violence, by requesting that plaintiff move along the parade route. Although Officer Barnum suggested to plaintiff that, if the event staff demanded he leave and if he thereafter refused to leave, he could be arrested, Officer Barnum did not detain Mr. Gathright and did not threaten to arrest him.

Officer Hull came to assist Officer Barnum. Officer Hull saw and heard the preachers pointing to individuals in the crowd and yelling obscenities about "fags." Officer Hull spent about 30 minutes trying to calm the crowd. He did not tell the preachers to get out of the street; he did not tell them they were trespassing; he did not tell them they would be arrested. Officers Barnum and Hull were simply trying to keep the peace. Similarly, Officer Waddell also heard three of these individuals yelling insults at members of the crowd. She tried to talk to the preachers, to maintain order and to make sure that no one got hurt. She knew about the district court's injunction, and was not trying to interfere with the individuals' free expression.

She did not threaten arrest or eviction. Officer Waddell merely asked the individuals if they would get up onto the sidewalk.

At the Festival event in the Park, there was no activity by the City taken against Mr. Gathright or any other preacher at all. Sergeant Parman was aware of the District Court's injunction, and he explained to the event people that he could not evict the preachers from the event. Sergeant Parman did not tell any of the preachers they could not go into the Festival; he did not evict any of the preachers from the Festival; he did not arrest any of the preachers; nor did he threaten to do any of these things.

The event organizers were concerned because of the inflammatory nature of the preachers' signs, which said things like "Got Aids Yet?" and "Fags Die." There were 25,000 to 30,000 people in the park at that time, and there was concern that, because of how inflammatory the signs were, the safety of the preachers could not be ensured. In order to ensure their safety, the event organizers decided to allow the preachers into the event only if they left the signs outside, and to have a group of event staff accompany them as they walked around the event.

As the preachers walked through the event, they were very loudly yelling such things as "God hates fags" and that homosexuals would "burn in hell." It was apparent that they were trying to elicit a violent response from the predominantly homosexual (or, at least, homosexual-friendly) crowd. They were, in fact, upsetting and angering the crowd; the event staff accompanying them counseled the event participants not to react. Eventually, the preachers left the event of their own accord.

Mr. Gathright attended the Bite of Oregon event in Waterfront Park on August 14, 2004. The Bite of Oregon is a benefit event for Special Olympics of Oregon. It is the organization's largest fundraising event of the year, and is critical to promoting public awareness of and support for Special Olympics and its mission. Special Olympics of Oregon has been putting on the Bite event for twenty years. In 2004, Special Olympics completely overhauled the event, trying to attract new vendors in order to feature the best restaurants from around the State of Oregon.

Mr. Gathright was standing in the middle of the busiest part of the event area at the busiest time of the event. He was yelling at individuals such things as: "Lesbians, go back into the closet where you belong, you're going to hell," and, "You're a sinner, you're going to hell because you're drinking." He was yelling at women that they were "going to hell" because they were showing too much skin and he was yelling at anyone with a cup in their hand that they were "going to hell." He was calling people "gluttons" and "fornicators." Plaintiff was visibly angering people.

Mr. Gathright created an obstruction of the pedestrian traffic and interfered with access to the vendors. It was apparent that he was trying to start a fight. It was clear that he was trying to get arrested. The event organizers were concerned that Mr. Gathright would provoke a violent confrontation. They were also concerned that Mr. Gathright, through his offensive and disruptive behavior, would cause the vendors, customers and sponsors not to support the event or Special Olympics of Oregon.

The event staff had been told by the Portland Police Bureau, prior to the event, that the preachers would be

there, that the police would not be able to exclude them, and that the event should try to find a suitable place where they could engage in their protected activity and have access to the event participants without disrupting the event itself. When the event staff and the police responded to the disturbance plaintiff was creating, the event's coordinator found a suitable alternative area for Mr. Gathright to speak from. He asked Mr. Gathright to accompany him there. Respondent refused, insisting that he had a right to stay where he was.

The police were doing their best to interact calmly with all involved. The police were concerned that Mr. Gathright might cause a fight, and that his own safety was in jeopardy. Sergeant Keist asked Mr. Gathright several times to move to the alternate area Mr. Fuller had located for him. He repeatedly refused.

At this point, the police believed they had probable cause to arrest Mr. Gathright for disorderly conduct, a violation of Oregon Revised Statutes § 166.025, and for failure to obey the reasonable direction of a park officer, a violation of the Code of the City of Portland, Oregon, § 20.12.240. Sergeant Keist also believed that Mr. Gathright had left the police no option but to arrest him in order to preserve the peace. At Sergeant Keist's direction, respondent was placed under arrest, and was transported to Central Precinct, where he was cited and released.

3. Proceedings Below

Respondent Edward Gathright sued the City of Portland and Pioneer Courthouse Square of Portland, Inc., a private, non-profit corporation which administers the City park at Pioneer Courthouse Square. Mr. Gathright

claimed that petitioners' policy of enforcing the decisions of their permit holders to exclude him from their events, which otherwise were free and open to the public, on the basis of his speech, violated his right to free speech, protected by the First Amendment. Respondent brought his complaint under the provisions of 42 U.S.C. § 1983, and the District Court had subject matter jurisdiction under 28 U.S.C. § 1343(a)(3).

The parties filed cross-motions for summary judgment. The District Court granted respondent's motion and denied petitioners'. The District Court enjoined petitioners "from removing [respondent] and others similarly situated from an area outside or inside of the boundaries under the control of an event permit unless there is probable cause to believe that they have violated a duly enacted statute or ordinance."[1]

Petitioners appealed. While that appeal was pending before the Ninth Circuit, the injunction remained in effect. On March 1, 2005, respondent filed a motion, seeking to have the City held in contempt of the injunction and further seeking an enlargement of the scope of the injunction. Both sides submitted affidavits and other evidence, and, following a hearing, the District Court entered an order on May 2, 2005, enlarging the injunction. That order required the City to:

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[1] The District Court further permanently enjoined petitioners from enforcing Portland City Code (PCC) 20.08.060, which prohibited the unreasonable interference with a permittee's activities under a permit in a park. While this action was pending in the Ninth Circuit, the Portland City Council repealed PCC 20.08.060 replaced it with prohibitions of specific conduct at events held under permit. The new version of PCC 20.08.060 is not at issue in this case.

- delete from its event permits the "Rules of Conduct" section and language authorizing "Persons in Charge" to evict or exclude persons from permitted areas – such persons may only be excluded based on probable cause to believe that they have violated a duly enacted statute or ordinance;

- notify all event permit holders that they may not deny entry to [respondent] or any other person similarly situated to any permitted event unless those persons have been previously lawfully excluded from the permit holder's event;

- add a section to the event permits that notifies future permit holders of the Court's injunction and the limitations on their ability to exclude persons from their events; and

- notify all Portland police officers of the Court's injunction and that the officers may not exclude persons based solely on the direction of the permit holder. The officers need probable cause to believe that such a person has violated a duly enacted statute or ordinance.

The District Court's Order further provided that neither the City nor its permit holders could "remove or exclude [respondent] or others similarly situated from an area within a permitted event unless plaintiff or others are causing an insurmountable impediment to pedestrian or vehicular traffic, such that a serious traffic safety concern is present." The City and the permit holders are directed not to "prevent [respondent] or others similarly situated from wearing signs or passing out pamphlets." Finally, the Order provides, "If the City or the permit

holder has created a 'free speech zone,' or other similar area, such an area shall not be the only place where plaintiff or others similarly situated are allowed to exercise their free speech rights, but shall be simply an option."

City of Portland appealed the May 2, 2005, Order enlarging the scope of the injunction. The Ninth Circuit consolidated that appeal with the pending appeal of the underlying permanent injunction. On February 24, 2006, the Ninth Circuit affirmed the district court's "judgment,"[2] but vacated and remanded the modified permanent injunction for reconsideration in light of its opinion.

REASONS FOR GRANTING THE WRIT

This case presents a question of national importance involving the most basic of the rights guaranteed by the Bill of Rights. This case requires the balancing of the competing First Amendment rights of private individuals or entities that obtain permits for large, public events in public parks, against the First Amendment rights of private individuals who attend those events to engage in their own competing speech and expression. There is a split among the circuits as to how to strike this balance. Only this Court ultimately can resolve the tension in those competing claims.

[2] Technically, the district court never entered a judgment in this case, because Mr. Gathright's claims for damages have yet to be resolved. The order for the permanent injunction and the order modifying that injunction were both interlocutory, and, as such, were appealable under 28 U.S.C. § 1292(a)(1).

In order to distinguish its holding from this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Ninth Circuit, as have the Sixth Circuit and at least one district court in the Eighth Circuit, adopted a distinction between people who want to "participate in" the event with competing speech, who are foreclosed by *Hurley*, and those, like respondent here, whom the Ninth Circuit sees as merely "attending" the event in order to engage in their own competing speech. *Gathright v. City of Portland*, 439 F.3d 573, 577 (9th Cir. 2006); *Parks v. City of Columbus*, 395 F.3d 643, 651 (6th Cir. 2005); *Wickersham v. City of Columbia*, 2006 U.S. Dist. LEXIS 15438 at *16 (W.D. Mo. 2006). The Third Circuit, however, has, under *Hurley*, upheld against a facial and as-applied challenge the provisions of a permit ordinance giving the permit holder exclusive control of the area under the permit, and allowing the exclusion of speech the permit holder did not want. *Diener v. Reed*, 77 Fed. Appx. 601, 606-09 (3d Cir. 2003), *affirming* 232 F. Supp. 2d 362 (M.D. Pa. 2002). One district court in the Seventh Circuit similarly has rejected the distinction between "participants" and mere "attendees." *World Wide Street Preachers' Fellowship v. Peterson*, 2004 U.S. Dist. LEXIS 13961 *29-*31 (S.D. Ind.), *appeal dismissed*, 388 F.3d 555 (7th Cir. 2004). The Court should grant the writ to resolve this split. It should adopt the Third Circuit's resolution, because that court gave appropriate regard to this Court's approval of park permitting systems in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), while the contrary decisions have not.

1. The Ninth Circuit has Misread *Hurley*.

In *Hurley*, this Court ruled that the organization holding the permit to organize the St. Patrick's Day Parade in Boston had the constitutional right to exclude from the parade an organization with whose viewpoint it disagreed, and that application of the Massachusetts public accommodations law to require the permittee to include that organization would violate the permittee's First Amendment rights. The Court explained that "the fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." 515 U.S. at 573. That autonomy includes the "right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.* at 574.

The Court, in *Hurley*, 515 U.S. at 569-70, explained the expressive nature of all parades:

> Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them. Spectators line the streets; people march in costumes and uniforms, carrying flags and banners with all sorts of messages (*e.g.*, "England get out of Ireland," "Say no to drugs"); marching bands and pipers play; floats are pulled along; and the whole show is broadcast over Boston television. [citation omitted] To be sure, we agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive matter of the speech.

The Court then rejected the notion that the State could require the parade organizers to include participants with whose message they disagreed, saying, that "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

The Court further reasoned, *id.* at 574, that the permit holder's right to control the message included the right simply to choose not to include any message on a given subject:

> Petitioners' claim to the benefit of this principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

All of the events at issue in this case included some quality of expression by the permit holders at least as great as that included in *Hurley*'s St. Patrick's Day parade. Each permit holder "clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while

remaining silent on another." *Hurley*, 515 U.S. at 574. Petitioners could not force these permit holders to incorporate respondent's message into their events without violating the permit holders' own First Amendment rights.

The Ninth Circuit attempted to distinguish *Hurley* on the ground that "*Hurley* involved the exclusion of those who wished to *participate* in the parade as marchers, not those who witnessed or opposed the procession." *Gathright*, 439 F.3d at 577 (citation omitted). The Ninth Circuit said, *id.* at 578, "*Hurley* does not, by its own terms, extend to these circumstances, where a speaker in a public forum seeks only to be heard, not to have his speech included or possibly confused with another's, and has not violated a valid statute or ordinance." The Ninth Circuit concluded, *id.*, that the holding of *Hurley* "was grounded in whether the plaintiff's views could be mistaken for those of the defendant."

In *Hurley*, 515 U.S. at 577, however, this Court expressly declined to hold that the potential for misattribution was necessary in order to invoke the permit holder's First Amendment protection: "Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."

Each event in question in this lawsuit similarly involves an overall message to be distilled from individual presentations, whether in the form of entertainment, exhibitions or vendors, and each unit's expression is perceived by event-goers as part of the whole. It is immaterial that the

individual units are stationary in these events, instead of marching in a parade. The permit holders are not mere conduits for other peoples' expression, *see Hurley*, 515 U.S. at 577-78; rather, they all are expressing themselves through the elements of their events. And respondent is not merely standing at the side of the events, silently signaling his approval or disapproval. *Contrast, Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997). Rather, he loudly interjects his message from within the midst of their events. Regardless of whether members of the public attending the events are likely to associate respondent's views with those of the event holders, his loud interjection of those views dilutes and compromises the permit holders' messages.

This Court has recognized that park permit systems are reasonable methods "'for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved.'" *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002), *quoting Poulos v. New Hampshire*, 345 U.S. 395 (1953). In *Thomas*, 534 U.S. at 322, the Court expressly adopted the Seventh Circuit's observation, in the same case below, "'[T]o allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech.'" The Court further reiterated, "Regulations of the use of a public forum that ensure the safety and convenience of the people are not 'inconsistent with civil liberties but . . . [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.'" *Id.*, quoting, in part, *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

Thomas concerned whether the authorities constitutionally could require one who wished to exercise his or her free speech rights to comply with permit regulations

for use of a public forum. But the ineluctable consequence of this Court's validation of that authority is that, consistently with *Hurley*, a person or entity that complies with those permit regulations and obtains a permit to hold an event that has some expressive quality to it obtains the right to control the message at the event and to exclude messages that dilute or compromise the permit holder's chosen message. And this is so regardless of whether the public might misperceive the unwanted message as being that of the permit holder.

This Court should grant the writ in this case to close the circle between *Hurley* and *Thomas*, and to say explicitly that an individual or entity that obtains a permit for an expressive event in a public park acquires the right to control the message at that event.

2. The Circuits and District Courts are Split.

The lower courts have struggled to determine how *Hurley* applies to events under permits other than parades, and they have not been consistent in their resolution. The Sixth Circuit has come to differing results in different cases. In *Sistrunk v. City of Strongsville*, 99 F.3d 194, 198 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997), the Sixth Circuit upheld a ban of opposition party buttons and the conduct of protest activities at an election campaign rally sponsored by a single party:

> The law cited by plaintiff may prohibit the City of Strongsville from denying any access to the Commons for expressive activity and from granting or denying permits based on the content of an applicant's speech, but it does not prohibit the city from issuing permits to groups seeking to

> make exclusive use of the Commons for expressive activity during a limited period of time. In fact, [*Hurley*] suggests that the city may not constitutionally require a permittee organization to *include* discordant speakers in its expressive activity.

Subsequently, in *Grider v. Abramson*, 180 F.3d 739, 751 (6th Cir. 1999), the Sixth Circuit upheld a ban on non-scheduled speech within the restricted area of an event:

> That restriction was narrowly focused upon promoting the City's and County's significant public interests in fostering the privileges of free expression and assembly of all participants who wished to see and hear the formally sanctioned presenters. No evidence indicated that either plaintiff had endeavored to secure placement on the official speakers' roster at either rally. In all events, the rally organizers were entitled to select and schedule public speakers, which entailed the power to exclude from their rostrum any unapproved would-be speaker. (Citations to *Hurley* and *Sistrunk* omitted).

However, the Sixth Circuit has distinguished both this Court's decision in *Hurley* and its own precedent in *Sistrunk*, in *Parks v. City of Columbus*, 395 F.3d 643, 651 (6th Cir. 2005), holding that a street preacher's First Amendment rights were violated when he was prohibited from preaching at an arts festival held under permit on a Columbus, Ohio, street.

In *Diener v. Reed*, 77 Fed. Appx. 601 (3d Cir. 2003), *affirming* 232 F. Supp. 2d 362 (M.D. Pa. 2002), the Third Circuit affirmed a decision of the Middle District of Pennsylvania, under circumstances similar to those in this case. Relying on *Hurley*, the Third Circuit concluded:

"[T]he grant of exclusivity provided to permit-holders through the ordinance is also an appropriate measure designed to foster, rather than restrict First Amendment activity." 77 Fed. Appx. at 609.

In *World Wide Street Preachers' Fellowship v. Peterson*, 2004 U.S. Dist. LEXIS 13961 *29-*31 (S.D. Ind.), *appeal dismissed*, 388 F.3d 555 (7th Cir. 2004), the district court expressly rejected the distinction that the district court and Ninth Circuit here made between "participants" and "attendees." There, the district court granted a preliminary injunction ordering the City "not to interfere with or threaten the plaintiffs with arrest for the orderly offering of literature within the special event area so long as it is not being done on the streets where the parade is to occur and it does not unduly impede the flow of pedestrian traffic," and denied the injunction as to the plaintiffs' desire to engage in stationary preaching along the parade route. *Id.* at *39-*41.

The Circuit and District Courts require guidance from this Court as to the application of *Hurley* to stationary events held in traditional public forums under permits. The Court should grant the writ and should reverse the Ninth Circuit's decision.

3. The Importance of the Issue.

Numerous organizations obtain permits to use the City of Portland's parks for their expressive events every year. These events draw thousands of people, and are critical to the organizations' efforts to garner public support for their messages, missions and activities. They are also critical to the City's mission of providing opportunities for public celebrations and the expression of various

points of view. Without the ability to control what goes on at their events, the organizations will have their messages diminished and will have public support for their missions eroded. Without the ability to exercise the exclusive rights they bargain for in their permits, they will stop having their events in the parks, and the public ultimately will lose the opportunity to participate in these worthwhile events.

Organizations and individuals who obtain temporary, exclusive permits to use public park areas for their expressive events should have the right, similar to that exercised by any lessee of property, to the quiet enjoyment of the areas covered by their permits, and to control the messages expressed at their events. It is crucial to the continued viability of large, public events that this Court clarify that right, which follows logically from *Hurley* and *Thomas*.

CONCLUSION

This case presents an important constitutional question that requires the Court to balance the respective First Amendment rights of private individuals and entities holding expressive public events under permits in traditional public forums and those of individuals who attend those events for the purpose of engaging in their own contrary or unwanted expression. The Circuits and District Courts are split and confused as to the proper application of this Court's teachings in *Hurley* and in *Thomas*; and the Ninth Circuit decided this case inconsistently with those cases. This Court should grant the writ in this case to close the circle between *Hurley* and *Thomas*, and to say

explicitly that an individual or entity that obtains a permit for an expressive event in a public park acquires the right to control the message at that event and to exclude messages that the person or entity does not want to express as part of its event.

Respectfully submitted,

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439 F.3d 573

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD GATHRIGHT,

Plaintiff-Appellee,

v.

CITY OF PORTLAND, Oregon, a municipal corporation; PIONEER COURTHOUSE SQUARE, INC., an Oregon nonprofit corporation,

Defendants-Appellants.

No. 04-35402

D.C. No. CV-03-00130-ALH

EDWARD GATHRIGHT,

Plaintiff-Appellee,

v.

CITY OF PORTLAND, Oregon, a municipal corporation; PIONEER COURTHOUSE SQUARE, INC., an Oregon nonprofit corporation,

Defendants-Appellants.

No. 05-35506

D.C. No. CV-03-00130-ALH

OPINION

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted
September 14, 2005 – Portland, Oregon

Filed February 24, 2006

Before: Raymond C. Fisher, Ronald M. Gould and Carlos T. Bea, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

Harry Auerbach, Office of City Attorney, Portland, Oregon, for the defendants-appellants.

Herbert G. Grey (argued) and Kelly E. Ford, Beaverton, Oregon, and John M. Lotz, Daehnke & Cruz, Irvine, California, for the plaintiff-appellee.

OPINION

FISHER, Circuit Judge:

This case concerns the intersection of two First Amendment rights: on the one hand, the classic right of an individual to speak in the town square; on the other hand, the interest organizations have in not being compelled to communicate messages not of their choosing. Plaintiff Edward Gathright is an evangelical Christian who preaches outdoors to the general public. In recent years, he has taken to doing so in various public locations in the City of Portland, including the Pioneer Courthouse Square and Waterfront Park, and often at privately sponsored, City-permitted events open to the public in those venues. Gathright himself has observed that it is "not unusual" for people hearing his jeremiads "to become upset" or "angry" when, for instance, he calls women "whores," "sluts," "Jezebels," "prostitutes" and "daughters of Babylon" or, at an event celebrating tolerance of homosexuality, he dons a t-shirt reading, "Got AIDS Yet?"

On at least six occasions, Portland's police officers forced Gathright to leave the open events he attended by threatening him with arrest for trespass. They did so not because Gathright violated a public nuisance law or like ordinance, but because Portland enforces the right of permit

holders sponsoring an event to evict any member of the public who espouses a message contrary to what the permit holder wants as part of its event. Under Portland City Code ("PCC") 20.08.060, "[i]t is unlawful for any person unreasonably to interfere with a permittee's use of a Park." The criminal trespass statute under which Gathright was excluded defines trespass as remaining unlawfully on the premises of an event after failing to honor a permittee's lawful direction to leave the event. O.R.S. §§ 164.245, 164.205(3)(b). According to the City's policy, a permittee may order a person to leave an open event when that person "unreasonably" interferes with the permittee's use of the licensed space. The police will enforce that order and the attendee's failure to obey the permittee is a Class C misdemeanor under Oregon criminal law.

In January 2003, Gathright brought suit, alleging that his First Amendment rights had been violated by the City of Portland and Pioneer Courthouse Square of Portland, Inc., a private nonprofit corporation that manages the Square for the City. The district court applied the test for First Amendment claims relating to government property laid out in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The court concluded that the City's enforcement of its permittees' demands to eject Gathright infringed Gathright's First Amendment rights because the City's policy was not narrowly tailored to serve what the court acknowledged to be the City's legitimate interest in "protecting the free speech rights of permittees." The district court granted Gathright a preliminary injunction.[1]

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[1] The City appealed, and this court affirmed in a memorandum disposition stressing the deferential standard of review of appeals of preliminary injunctions. *See Gathright v. City of Portland*, 74 Fed.

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After further proceedings, the district court in April 2004 entered a permanent injunction prohibiting the City from "removing plaintiff and others similarly situated from an area outside or inside of the boundaries under the control of an event permit unless there is probable cause to believe that they have violated a duly enacted statute or ordinance." The court also barred the City from enforcing PCC 20.08.060. The City timely appealed to this court.

Subsequently, the district court granted plaintiff's motion to modify the injunction. The *modified* permanent injunction requires the City to "delete from its event permits the 'Rules of Conduct' section" that contained language authorizing "'Persons in Charge' to evict or exclude" people from events without probable cause; to notify all event permit holders of the injunction and its provisions; to add a section to event permits that "notifies future permit holders of the court's injunction"; to notify Portland's police officers of the same; and "not [to] place unreasonable time, place, and manner restrictions on plaintiff's speech, or that of others similarly situated to plaintiff." The City also appealed this modification, and we consolidated the two appeals.

Because the district court properly concluded that the City infringed Gathright's First Amendment rights, we affirm that part of its judgment. However, because the City of Portland has repealed and replaced the provision of the Portland City Code that was the basis of the district court's decision, we vacate the modified permanent injunction and

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Appx. 810, 2003 U.S. App. LEXIS 18838 (9th Cir. Sept. 10, 2003). Our disposition affected only the rights of the parties and remained in force pending the district court's final judgment.

remand to the district court to reconsider it in light of current circumstances.

I. STANDARD OF REVIEW

"We review a district court's decision to issue a permanent injunction for abuse of discretion, but we review any determination underlying the court's decision by the standard that applies to that determination." *United States v. Hovsepian*, 359 F.3d 1144, 1156 (9th Cir. 2004) (en banc). When, as here, the injunction turns on a question of law, "we review de novo the district court's injunction." *Id.*

II. DISCUSSION

A. The First Amendment

Gathright asserts his classic right to preach in the town square. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) ("Our tradition of free speech commands that a speaker who takes to the street corner to express his views . . . should be free from interference by the State based on the content of what he says."). The City in turn asserts its interest in protecting the right of organizations holding events not to be forced to include the words of a speaker "expressing a message not of the private organizers' own choosing." *Id.* at 566. Gathright's right to speak must be weighed against the City's interest in protecting its permittees' speech from being diluted by what Gathright says.[2]

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[2] Gathright argues that he as a private actor cannot infringe the permittees' speech rights inasmuch as the First Amendment applies

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The City concedes that Gathright's preaching is a form of expression protected by the First Amendment. It argues, however, that its policy of allowing permittees to exclude people from events in public forums is a valid time, place or manner regulation of public property. In evaluating this proffered justification, we are guided by the Supreme Court's decisions in *Ward* and *Hurley*.

Hurley held that the State of Massachusetts could not require the organizers of an annual St. Patrick's Day parade to allow an organization in favor of gay rights to march in the parade. The Court explained that "[p]arades are . . . a form of expression" entitled to First Amendment protection, 515 U.S. at 568, and that those who organize parades "ha[ve] the autonomy to choose the content of [their] own message." *Id.* at 573. The Court established that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Id.* at 576. Under the circumstances in *Hurley*, the Court concluded that the organizers of the St. Patrick's Day parade had a First Amendment right not to be compelled to allow the gay-rights organization to march as part of the parade: to do so would have forced the parade's organizers to communicate a message they did not endorse.

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against government action only. However, because Gathright has obtained an injunction that restricts the City's permittees from exercising their purported First Amendment rights, and because an injunction constitutes state action, it is proper for us to conduct a First Amendment analysis. *See Shelley v. Kraemer*, 334 U.S. 1, 15 (1948); *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991).

The City argues that *Hurley* requires us to vacate the district court's injunction because the City's policy of evicting on request those who express messages the permittees disapprove of is a valid time, place or manner restriction. In support of its argument, the City marshals three points: first, its policy serves the legitimate, content-neutral interest it has in protecting permittees' right under *Hurley* to determine the contents of their own messages; second, the policy is narrowly tailored to that interest because it "limits only that speech which permittees have a right to exclude"; and third, Gathright has ample alternative channels of communication. *See Ward*, 491 U.S. at 791.

We disagree with the City's reading of *Hurley*. *Hurley* involved the exclusion of those who wished to *participate* in the parade as marchers, not those who witnessed or opposed the procession. *Cf. Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C. Cir. 1997) (refusing to extend *Hurley* to allow parade organizers to exclude people wishing to stand along parade route holding protest signs). As the district court has here observed, "[t]here is a distinction between participating in an event and being present at the same location. Merely being present at a public event does not make one part of the organizer's message for First Amendment purposes." *Gathright v. City of Portland*, 315 F. Supp. 2d 1099, 1103 (D. Or. 2004).

Applying *Ward's* criteria to the facts before us, we conclude that the City's policy is not a valid time, place or manner regulation of public space. *See Ward*, 491 U.S. at 791. Solely for the purposes of the City's appeal, we accept its proposition that its policy is content neutral and that it has a significant interest in protecting the free speech rights of people and organizations who have obtained

permits to use a public park for an event open to the public.[3] We hold, however, that the policy of allowing permittees unfettered discretion to exclude private citizens on any (or no) basis is not narrowly tailored to the City's legitimate interest in protecting its permittees' right under *Hurley*. *See Ward*, 491 U.S. at 798-800. Because the City's policy is not narrowly tailored, we do not reach whether it leaves open ample alternative channels of communication.

Hurley does not, by its own terms, extend to these circumstances, where a speaker in a public forum seeks only to be heard, not to have his speech included or possibly confused with another's, and has not violated a valid statute or ordinance. In *Hurley*, the Supreme Court made clear that every marching participant in the St. Patrick's Day parade was an expressive unit, the sum of which constituted the expressive message attributable to the parade's organizer. 515 U.S. at 574. The inclusion in the parade of the Irish-American Gay, Lesbian and Bisexual Group of Boston "would likely be perceived as having resulted from the [organizers'] customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well." *Id.* at 575. "[I]n the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." *Id.* at 577. Here, there is no risk that

[3] The City's assertion that its policy is content neutral is questionable. The policy enables private citizens to exclude people from events in public forums solely on the basis of the content of their speech. However, because Gathright has conceded the City's assertion of content neutrality as well as its substantial interest in protecting permittees' speech, we accept both as true for purposes of this appeal.

Gathright's provocations could be mistaken by anybody as part of the message of the events he protests. For this reason, the City's citation of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), is also unavailing. In *Dale*, the Supreme Court extended *Hurley* to hold that the Boy Scouts could not be forced by a state antidiscrimination statute *to employ* a homosexual scoutmaster because the act of doing so would send a message contrary to the Boy Scout's creed. *Id.* at 656. *Dale's* holding, like *Hurley's*, was grounded in whether the plaintiff's views could be mistaken for those of the defendant.

Gathright may be a gadfly to those with views contrary to his own, but First Amendment jurisprudence is clear that the way to oppose offensive speech is by more speech, not censorship, enforced silence or eviction from legitimately occupied public space. *See Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute."). The City has not argued that Gathright violated any ordinance other than PCC 20.08.060, and the district court's injunction did not limit the City's ability to evict Gathright from events in public forums where there is probable cause to believe that he violated a different, valid statute or ordinance. *See, e.g., Virginia v. Black*, 538 U.S. 343, 363 (2003) (allowing regulation of cross burning as subset of intimidating speech); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) (holding that states may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

We find persuasive the reasoning of the Sixth Circuit in a case with facts similar to these. In *Parks v. City of Columbus*, 395 F.3d 643, 654 (6th Cir. 2005), the court held

that a municipality could not evict a controversial street preacher from a permitted event held on a public street simply because the event's organizers found the preacher's message to be odious. Our sister circuit distinguished *Hurley*, as we do, on the basis that Parks, like Gathright, "d[id] not seek inclusion in the speech of another group." *Id.* at 651. Instead, he was "merely another attendee" of a permitted event open to the public, in a public forum. *Id.* Correspondingly, we find *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996), a Sixth Circuit case the City cites, to be distinguishable. In *Sistrunk*, the event at issue was a closed political rally in favor of the incumbent president, President George H.W. Bush. *Id.* at 196. The rally was not open to the public, but was instead "limited to the members of the organization and their invitees." *Id.*; *see also Parks*, 395 F.3d at 651. Because the protester supporting the challenger, Governor Bill Clinton, sought to be included in the message of a closed rally favoring President Bush, and presumably to affect the media coverage of the event, the protester threatened to infringe the speech rights of those who organized the rally. *Sistrunk*, 99 F.3d at 199-200. Such circumstances differ from those here, where Gathright does not seek inclusion in a closed event strictly "limited to the members of [an] organization and their invitees." *Id.* at 196. "The City cannot . . . claim that one's constitutionally protected rights disappear [where] a private party is hosting an event that remain[s] free and open to the public." *Parks*, 395 F.3d at 652.

Because PCC 20.08.060 is not narrowly tailored to the City's interest in protecting its permittees' right under *Hurley*, we affirm the district court's conclusion that the ordinance is not a valid time, place or manner regulation.

B. The District Court's Injunction

Having found the district court's underlying analysis correct, we review the court's injunction for abuse of discretion. *See United States v. Hovsepian*, 359 F.3d 1144, 1156 (9th Cir. 2004) (en banc).

1. *Enjoining Eviction Based on Activity Outside Event Areas*

The City argues that the district court abused its discretion by entering an injunction partly premised on the assumption that Gathright was threatened with arrest when he engaged in protected speech at the periphery of a permitted event, in particular, the sidewalks within Waterfront Park, the traffic island on Naito Parkway and the sidewalks around Pioneer Courthouse Square. The City contends there is conflicting evidence as to whether Gathright was prevented from being in close proximity to an event based on things he said outside the precise confines of the permit area, and that it was error to grant Gathright summary judgment on this issue.

Irrespective of whether Gathright had in fact been excluded from events based on his speech outside the venues' bounds, the district court saw fit to specify that Gathright could not be so excluded in the future. In light of the district court's correct First Amendment analysis, it did not abuse its discretion. Moreover, any lack of certainty about Gathright's conduct outside of events was immaterial to the district court's correct finding that the City's ordinance was not a valid time, place or manner regulation. Consequently, the district court did not err in granting summary judgment on *that* issue since there was

no dispute as to a material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

2. *Enjoining Enforcement of PCC 20.08.060*

PCC 20.08.060 is entitled "Unlawful Interference." As previously noted, it provides that "[i]t is unlawful for any person unreasonably to interfere with a permittee's use of a park." In *City of Portland v. Lee*, No. 9907-46965 (Nov. 22, 1999), the Multnomah County Circuit Court found PCC 20.08.060 unconstitutional under *Ward's* narrow-tailoring prong because the ordinance was broad and vague as to what an "unreasonable" interference might be: "the ordinance's use of the phrase 'unreasonably to interfere' is far too broad to not sweep into its reach any protected speech which any permittee, user, guard or police officer concludes might be unreasonable." The City did not appeal that determination.

Notwithstanding the judgments of the state court and district court that PCC 20.08.060 is invalid, the City argues that the district court abused its discretion in enjoining the City from enforcing the ordinance. It asserts that Gathright failed to adduce evidence proving that the City had enforced, or was likely to enforce, the provision against him, and that Gathright therefore lacked standing to assert the unconstitutionality of the provision. The City further contends that it is not precluded from arguing in this action that the ordinance is constitutional, regardless of the state court's determination.

These arguments are without merit. First, in addition to the citations for trespass and other violations, the record contains a "Notice of Exclusion" and "Trespass Warning" that cites Gathright for "Interference with Permitted

Events." The language in this exclusion, completed by a Portland police sergeant, refers to PCC 20.08.060. Such evidence belies the City's assertion that Gathright lacks standing.

Second, the City is in any case estopped from relitigating the constitutionality of PCC 20.08.060. 28 U.S.C. § 1738 requires a federal court to "give the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986). The Oregon state court's judgment, which the City did not appeal, precludes the City from arguing now that the ordinance's restriction against unreasonable interference is not unconstitutionally overbroad. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."). Nor is there an exceptional circumstance here that warrants relitigating this issue. *See Restatement (Second) of Judgments* § 29 (1982); *see also Drews v. EBI Cos.*, 795 P.2d 531 (Or. 1990) (Supreme Court of Oregon applying *Restatement (Second) of Judgments* as Oregon law on issue preclusion). Because the City was a party to the proceedings in state court and had "a full and fair opportunity to litigate" the ordinance's constitutionality in that forum, *Montana v. United States*, 440 U.S. 147, 153, (1979), it cannot do so again here, and the district court did not err in barring the City from enforcing the ordinance.[4]

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[4] Because the City is collaterally estopped from litigating this issue, we do not reach whether it is alternatively barred from doing so under the *Rooker-Feldman* doctrine. *See Exxon Mobil Corp. v. Saudi*

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3. *The Modifications to the Injunction*

The City has separately appealed the modifications that the district court made to its permanent injunction. The City argues that the district court abused its discretion, because the more recent permitted events that led to the modifications were "gated and fenced, and the permittees controlled entry into those events." The City asserts that these events were outside the scope of the original complaint, which only concerned events free and open to the public, and that the modified injunction is thus invalid. Gathright argues in response that the more recent events were open to the public. Notwithstanding the parties' contrary views, the district court's modifications did not expand the prior injunction's scope to "gated and fenced" events. We therefore see no reason to hold the injunction invalid on that basis and decline to determine, on the limited record before us, whether the injunction would be invalid if it did apply to such events.

We do consider whether the district court otherwise abused its discretion in making the modifications. The injunction as modified now requires the City to "delete from its event permits the 'Rules of Conduct' section." Read in the context of this case, the instruction means that the City must delete the rule that bestows the right on permittees to exclude people arbitrarily. However, the City is correct that a literal reading of the injunction could lead one to conclude that the City must not have *any* rules of conduct printed on its permits. Because this would be an abuse of discretion and cannot have been the district court's intent,

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Basic Indus. Corp., 544 U.S. 280 (2005) (clarifying *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

we construe the modification so as to avoid the absurd result contemplated by the City. In this light, we hold that the district court did not abuse its discretion.

The modified injunction also states that:

> [T]he City and all permit holders are ordered to not place unreasonable time, place, and manner restrictions on plaintiff's speech, or that of others similarly situated to plaintiff. For example, neither the City nor any permit holder shall remove or exclude plaintiff or others similarly situated from an area within a permitted event unless plaintiff or others are causing an insurmountable impediment to pedestrian or vehicular traffic, such that a serious traffic safety concern is present.

The injunction then mandates that "[n]either the City nor any permit holder shall prevent plaintiff or others similarly situated from wearing signs or passing out pamphlets." These provisions, like the one discussed in the preceding paragraph, could be read to occasion absurd consequences contrary to the district court's intent and irrelevant to the constitutional concerns in this dispute. For instance, the court's reference to an "impediment to pedestrian or vehicular traffic" could be literally interpreted so that it prevents the City from evicting an attendee at an event who violates a legitimate statute, but who does so without causing a sufficiently "insurmountable" impediment to traffic. Similarly, the modified injunction could be construed to enjoin the City from preventing "plaintiff or others similarly situated from wearing signs or passing out pamphlets," notwithstanding that we have upheld instances in which a state has validly prohibited the use of certain kinds of signs. *See,*

e.g., Vlasak v. Superior Court of California, 329 F.3d 683 (9th Cir. 2003) (upholding Los Angeles ordinance prohibiting the possession, during demonstrations, of wooden objects exceeding certain thickness).

The district court enjoys ample latitude to fashion an injunction appropriate to the facts before it. In this case, the court appears to have determined that more forceful language was necessary to ensure the City's compliance with the court's constitutional analysis. We do not read the district court's injunction in such a way as to bind the City in ways unwarranted by the constitutional issues underlying this dispute. Accordingly, the modifications do not require us to vacate the injunction in whole or part. However, because the Portland City Council repealed and replaced PCC 20.08.060 by Ordinance No. 179337, effective June 15, 2005, we remand to the district court to reconsider the appropriateness of its injunction – particularly those parts of it that concern former PCC 20.08.060 – in light of recent developments. At that time, the district court may take into consideration the potential ambiguities in its injunction as currently written.

Therefore, we **AFFIRM** the district court's judgment, but **VACATE** and **REMAND** its modified permanent injunction for further proceedings in light of our opinion. The parties shall bear their own costs.

315 F.Supp. 2d 1099

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

EDWARD GATHRIGHT,

Plaintiff,

v.

CITY OF PORTLAND and PIONEER COURTHOUSE SQUARE OF PORTLAND, INC.

Defendants.

Civil No. 03-130HA

AMENDED OPINION AND ORDER[1]

Herbert G. Grey
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[1] The Opinion issued on March 10, 2004, is amended pursuant to a meritorious Motion for Clarification filed by plaintiff. The Conclusion of this Opinion is amended so as to be consistent with the Opinion's analysis that recognizes that defendants are permanently enjoined from removing plaintiff or others similarly situated from either inside or outside of the boundaries established by an event permit unless there is probable cause to believe that a duly enacted statute or ordinance has been violated by the person or persons.

HAGGERTY, Chief Judge:

The facts of this case have been throughly reviewed in the court's order granting plaintiff's Motion for a Preliminary Injunction (Doc. #30) and need not be repeated at length here. Plaintiff brought this case in January 2003, alleging violations of his civil rights against defendants the City of Portland and Pioneer Courthouse Square of Portland, Inc. In April 2003, the court granted plaintiff's Motion for a Preliminary Injunction, enjoining defendants from enforcing PCC 20.08.060[2] and from ejecting plaintiff from public events unless there is probable cause to believe plaintiff has violated a valid statute or city ordinance. This decision was appealed and the Ninth Circuit affirmed (Doc. #40). On November 20, 2003, plaintiff filed a Motion for Partial Summary Judgment Granting a Permanent Injunction (Doc. #42). On December 16, 2003, defendants filed a Cross-Motion for Summary Judgment (Doc. #45). Plaintiff now requests that this court make the preliminary injunction permanent. For the reasons provided below, plaintiff's motion is granted and defendants' motion is denied.

In *City of Portland v. Lee*, Multnomah County Circuit Ct. No. 9907-46965 (1999), Judge Kantor held that PCC 20.08.060 was facially invalid under the First Amendment because it restricted a significant amount of protected speech. The City did not appeal the decision and has not repealed the ordinance or enacted a replacement. Under *Lee*, the City cannot prohibit speech in a public park

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[2] PCC 20.08.060 is titled "Unlawful Interference" and prevented "any person" from "unreasonably" interfering with a permittee's use of a park.

absent a violation of a state statute or a municipal ordinance. Plaintiff asserts that despite Judge Kantor's proclamation that PCC 20.08.060 is unconstitutional, the City has used the ordinance as the basis for excluding plaintiff. Defendants contend that their authority for excluding plaintiff did not stem from PCC 20.08.060, but from the constitutional rights of permit holders to control the content of the message presented at their event. Defendants advance no further argument for why they should not be permanently enjoined from enforcing PCC 20.08.060. For the reasons provided in the Opinion and Order dated April 23, 2003, plaintiff's motion for a permanent injunction is granted.

QUESTION PRESENTED

The question that remains before this court is whether the constitutional rights of private permittees holding events in public forums may compel the government to enforce the decisions of permittees to exclude individuals from the event and its periphery.

Defendants assert they are entitled to summary judgment because as a matter of law, private persons who use City parks under permits possess a First Amendment right to control the messages delivered at their events. As such, defendants' conduct in enforcing the decisions of the permit holders as to which speech will be allowed at their events does not violate plaintiff's own First Amendment rights. Plaintiff does not dispute this contention in the abstract, but argues that the permittees' First Amendment rights are not superior to those of an attendee, such as plaintiff, who was simply at the events and was not otherwise disrupting the events or violating the law.

STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not proper if there are disputes over facts that may affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts that show a genuine issue for trial. *Id.* at 324. Assuming there has been sufficient time for discovery, summary judgment should be entered against a "party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party; and (3) the court must assume the truth of direct evidence set forth by the nonmoving party if it conflicts with direct evidence produced by the moving party. *T.W. Elec. Serv. v. Pac. Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). Summary

judgment is inappropriate when different ultimate inferences can be reached. *Sankovich v. Life Ins. Co. of N. Am.*, 638 F.2d 136, 140 (9th Cir. 1981).

The issue of material fact required by Rule 56 to entitle a party to proceed to trial does not need conclusive resolution in favor of the party asserting its existence. Rather, all that is required is sufficient evidence supporting the claimed factual dispute to require a trier of fact to resolve the parties' differing versions of the truth at trial. *Id.* At the summary judgment stage, the judge does not weigh conflicting evidence or decide credibility. Those determinations are the province of the factfinder at trial. *Id.*, *see also Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996) (on a motion for summary judgment, the court does not weigh the evidence or determine the truth of the matter asserted, but decides only whether there is a genuine issue for trial).

To be entitled to a permanent injunction, the party seeking the injunction must actually succeed on the merits. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12 (1987). The party must also show that there is no adequate remedy at law. *Continental Airlines v. Intra Brokers, Inc.*, 24 F.3d 1099, 1102 (9th Cir. 1994). If there is the possibility of future wrongful conduct, a legal remedy is inadequate. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990).

ANALYSIS

The Supreme Court has recognized that the First Amendment rights of permittees to use a public forum includes the right to exclude speech with which the permittee disagrees. *Hurley v. Irish-American Gay, Lesbian*

and Bisexual Group of Boston, et al., 515 U.S. 557, 558 (1995). In *Hurley*, the Supreme Court held that Massachusetts may not "require private citizens who organize a parade to *include among the marchers* a group imparting a message the organizers do not wish to convey." *Id.* at 559 (emphasis added). The Massachusetts law would have forced parade organizers to allow a gay, lesbian, and bisexual group (GLIB) to march in the parade. The Court reasoned that "the fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." *Id.* Similarly, the Sixth Circuit has held that a private political organization holding a rally in a public commons for one political candidate may prevent attendees from participating in the rally as members of the audience if they are wearing a rival political candidate's campaign button. *Sistrunk v. City of Strongsville*, 99 F.3d 194, 199 (6th Cir. 1996).

Defendants rely on *Hurley* and *Sistrunk* in support of their proposition that the City has a constitutionally-mandated interest in protecting the First Amendment rights of the permittees to oversee over the content of the messages expressed at the permittees' events, even at the expense of other individuals' rights. While defendants are correct in that permittees do have the constitutional right to determine the content of speech that will be expressed at their event, this right does not extend to individuals who are *not* participants in the event. The Court in *Hurley* repeatedly referred to GLIB as "participants." *Id.* at 570, 573 (the Court emphasizes that GLIB wanted to participate "as a unit in the parade . . . for the very purpose of marching in it. . . ."). The Court stated that because "every participating unit affects the message conveyed by the private organizers," allowing GLIB to participate in

the parade "essentially requir[ed] [the permittees] to alter the expressive content of their parade." *Id.* at 573.

There is a distinction between participating in an event and being present at the same location. Merely being present at a public event does not make one part of the event organizer's message for First Amendment purposes. The D.C. Circuit Court of Appeals noted this distinction in *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997), wherein the court reversed the district court's order allowing event organizers to bar individuals from engaging in sign-bearing protests on the sidewalk during an inaugural parade. The court stated,

> All [the protesters] seek is the First Amendment-protected right to stand on the sidewalk and peacefully note their dissent as the parade goes by. . . . No case called to our attention says that anyone has ever successfully established the power of a government to so suppress opposing viewpoints; indeed, in few cases has the government of the United States even tried.

Id. at 1456-67. The decision in *Mahoney* underscores that there is an important constitutional difference between forcing a permittee to include a dissenter as a participant in a defined event where the public will reasonably conclude the dissenter's message is part of or sanctioned by the permittee, and excluding a dissenting speaker who is simply located at an event either to protest the permittee's message or to take advantage of a crowd to proselytize.

Contrary to the facts in *Hurley*, plaintiff was not a participant in the permittees' events. Construing the facts in the light most favorable to the plaintiff, on at least three occasions, plaintiff was outside of the premises of the

event.[3] Furthermore, the act of including messages contrary to the private event organizers' wishes in both *Hurley* and *Sistrunk* would have necessarily changed the organizers' messages. Attendees at the parade would have assumed that the permittees in *Hurley* sympathized or endorsed the views presented by the gay marchers. *Id.* at 574-75. In *Sistrunk*, the event organizers' message that their candidate would win would have been diminished if rival political buttons were displayed by attendees. *Sistrunk*, 99 F.3d at 199.

However, in this case, there was no danger that any member of the public would attribute plaintiff's pietistic messages to the private organizers of the events in the City parks. Plaintiff's preaching was often unrelated to or directly contrary to the ideas being expressed at these events. Going to an event to preach and carry signs bearing a religious message is distinct from attempting to participate in a parade or display a controversial button at a political rally. As in *Mahoney*, if plaintiff is a dissenting speaker on the sidewalk, no one can be confused into believing his message is part of that intended by the permittee, unlike those who are actually participating in the event. *Mahoney*, 105 F.3d at 1456-57. Thus, plaintiff was not infringing on the permittees' fundamental right of protection under the First Amendment to have the "autonomy to choose the content of [their] own message." *Hurley*, 515 U.S. at 573.

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[3] Plaintiff contends that his activities were prohibited when he was on the sidewalks within Waterfront Park, the traffic island in Naito Parkway, and the sidewalks around Pioneer Courthouse Square.

Waterfront Park and Pioneer Courthouse Square are public parks and are therefore "quintessential public forums." *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994). When a private party obtains an event permit to use these public forums, the issuance of the permit does not transform their existence as a public forum. Despite the issuance of a permit to a private party to hold an event in a public forum, the public forum still receives heightened protection from free speech restrictions. *See e.g. United States v. Grace*, 461 U.S. 171, 180 (1983) ("Congress . . . may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums. . . .") (quoting *United States Postal Serv. v. Greenburgh Civic Ass'ns.*, 453 U.S. 114, 133 (1981)).

Although Waterfront Park and Pioneer Courthouse Square remain traditional public forums at all times, permittees should still be able to conduct their events free from unlawful disruptive interference. Thus, defendants have the authority to regulate plaintiff's simultaneous First Amendment activities through reasonable time, place, and manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). However, any regulation must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577 (9th Cir. 1993).

The parties agree that defendants' policy of allowing private parties to determine whose speech may be heard at their events is content-neutral and that defendants' application of this policy to plaintiff in this case was content-neutral. It is also agreed that defendants' enforcement policy serves the significant governmental

interest in protecting the free speech rights of people and organizations who have obtained permits to use a public park. Thus, the remaining question is whether or not defendants' enforcement scheme is narrowly tailored.

The court holds that the City may lawfully exclude attendees of ordinary public events held on public property only if they violate a valid statute or ordinance. Under the City's policy, there is no certainty that individuals are ejected because they violated a valid statute or ordinance. The criminal trespass statute under which plaintiff was purportedly excluded defines trespass as failing to honor a permittee's "lawful direction" to leave an event, but fails to define "lawful." O.R.S. 164.245; 164.205(3)(b). A permittee's direction to leave a public event would be "lawful" only if plaintiff has violated a valid statute or ordinance. However, the statute fails to provide the officer charged with enforcing the criminal trespass statute or the permittee any guidance as to what constitutes a "lawful" reason that they may eject attendees from their events based on the attendees' speech. Accordingly, the court is compelled to conclude that the City's policy is not narrowly tailored to serve its interest in promoting the permittee's ability to hold events without undue disruption.

Defendants assert that their policy of leaving it to the permittees' discretion to determine which speech to allow at their events and enforcing these decisions should be construed as narrowly tailored to defendants' interest because it limits only that speech that the permittees have a right to exclude. This argument is without merit. The City does nothing to ensure that individuals are ejected solely because their speech is disruptive. For example, a private permittee may issue rules for its event for the City to enforce that expressly condition attendance on speech

that conforms to its own peculiar rules, regardless of whether an individual is being disruptive.

In addition, under defendants' view, a private permittee may direct someone to leave who displays or voices a message with which the permittee disagrees. Such arbitrary discretion and enforcement is not narrowly tailored. Under defendants' enforcement scheme, the police are given no tools with which to evaluate whether a party may be excluded from an event. It cannot be left up to the discretion of the permittees to arbitrarily determine whether specific conduct is disruptive. Neither the criminal trespass statute nor PCC 20.08.060 provides the guidance needed to comport defendants' enforcement scheme with the First Amendment.

CONCLUSION

The parties dispute whether plaintiff was in fact arrested or excluded for conduct that occurred both within and without the boundaries of areas under the control of the event permit holders. If defendants arrested or excluded plaintiff while he was speaking outside of the event boundaries or if defendants arrested or excluded plaintiff while he was within a protected public forum, then defendants may have violated plaintiff's First Amendment rights unless plaintiff violated a duly enacted law or ordinance. However, there is no guidance in either the criminal trespass statute or PCC 20.08.060 as to what constitutes disruptive behavior that would entitle an event permit holder to lawfully arrest or exclude plaintiff.

Defendants are permanently enjoined from enforcing PCC 20.08.060. In addition, defendants are permanently enjoined from removing plaintiff and others similarly

situated from an area outside or inside of the boundaries under the control of an event permit unless there is probable cause to believe that they have violated a duly enacted statute or ordinance. Accordingly, plaintiff's Motion for Partial Summary Judgment Granting a Permanent Injunction (Doc. #42) is GRANTED and defendants' Motion for Summary Judgment (Doc. #45) is DENIED.

IT IS SO ORDERED.

DATED this 6 day of April 2004.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

EDWARD GATHRIGHT,

Plaintiff,

v.

Civil No. 03-130-HA

CITY OF PORTLAND and
PIONEER COURTHOUSE
SQUARE OF PORTLAND, INC.

ORDER

Defendants.

HAGGERTY, Chief Judge:

On April 25, 2005, the court heard oral argument on plaintiff's Motion for Order to Show Cause (Doc. #64). At that time, the court had not reviewed Exhibit 11 to Paul DeParrie's Affidavit (video footage from The Bite filmed on August 14, 2004). The court has now seen the video and finds that Exhibit 11 does not support the City of Portland's argument. The court grants plaintiff's motion and modifies the permanent injunction as set forth in the April 6, 2004 Opinion and Order as follows:

The City of Portland (the City) is ordered to:

- delete from its event permits the "Rules of Conduct" section and language authorizing "Persons in Charge" to evict or exclude persons from permitted areas – such persons may only be excluded based on probable cause to believe that they have violated a duly enacted statute or ordinance;

- notify all event permit holders that they may not deny entry to plaintiff or any other person similarly situated to any permitted event unless those persons have been previously lawfully excluded from the permit holder's event;
- add a section to the event permits that notifies future permit holders of the court's injunction and the limitations on their ability to exclude persons from their events; and
- notify all Portland police officers of the court's injunction and that the officers may not exclude persons based solely on the direction of the permit holder. The officers need probable cause to believe that such a person has violated a duly enacted statute or ordinance.

In addition, the City and all permit holders are ordered to not place unreasonable time, place, and manner restrictions on plaintiff's speech, or that of others similarly situated to plaintiff. For example, neither the City nor any permit holder shall remove or exclude plaintiff or others similarly situated from an area within a permitted event unless plaintiff or others are causing an insurmountable impediment to pedestrian or vehicular traffic, such that a serious traffic safety concern is present. Neither the City nor any permit holder shall prevent plaintiff or others similarly situated from wearing signs or passing out pamphlets. If the City or the permit holder has created a "free speech zone," or other similar area, such an area shall not be the only place where plaintiff or others similarly situated are allowed to exercise their free speech rights, but shall be simply an option.

IT IS SO ORDERED.

DATED this 2 day of May 2005.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Freedom of religion, speech, and press; right to assemble and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. [Proposed by Congress in 1789 and ratified by the necessary number of states in 1791]

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ORS 164.205 Definitions for ORS 164.205 to 164.270. As used in ORS 164.205 to 164.270, except as the context requires otherwise:

(1) "Building," in addition to its ordinary meaning, includes any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein. Where a building consists of separate units, including, but not limited to, separate apartments, offices or rented rooms, each unit is, in addition to being a part of such building, a separate building.

(2) "Dwelling" means a building which regularly or intermittently is occupied by a person lodging therein at night, whether or not a person is actually present.

(3) "Enter or remain unlawfully" means:

(a) To enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public or when the entrant is not otherwise licensed or privileged to do so;

(b) To fail to leave premises that are open to the public after being lawfully directed to do so by the person in charge;

(c) To enter premises that are open to the public after being lawfully directed not to enter the premises; or

(d) To enter or remain in a motor vehicle when the entrant is not authorized to do so.

(4) "Open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would

cause a reasonable person to believe that no permission to enter or remain is required.

(5) "Person in charge" means a person, a representative or employee of the person who has lawful control of premises by ownership, tenancy, official position or other legal relationship. "Person in charge" includes, but is not limited to the person, or holder of a position, designated as the person or position-holder in charge by the Governor, board, commission or governing body of any political subdivision of this state.

(6) "Premises" includes any building and any real property, whether privately or publicly owned. [1971 c.743 §135; 1983 c.740 §33; 1999 c.1040 §10; 2003 c.444 §1]

ORS 164.245 Criminal trespass in the second degree. (1) A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully in a motor vehicle or in or upon premises.

(2) Criminal trespass in the second degree is a Class C misdemeanor. [1971 c.743 §139; 1999 c.1040 §9]

ORS 166.025 Disorderly conduct in the second degree. (1) A person commits the crime of disorderly conduct in the second degree if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, the person:

(a) Engages in fighting or in violent, tumultuous or threatening behavior;

(b) Makes unreasonable noise;

(c) Disturbs any lawful assembly of persons without lawful authority;

(d) Obstructs vehicular or pedestrian traffic on a public way;

(e) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse;

(f) Initiates or circulates a report, knowing it to be false, concerning an alleged or impending fire, explosion, crime, catastrophe or other emergency; or

(g) Creates a hazardous or physically offensive condition by any act which the person is not licensed or privileged to do.

(2) Disorderly conduct in the second degree is a Class B misdemeanor. [1971 c.743 §220; 1983 c.546 §5; 2001 c.104 §55; 2005 c.631 §1]

Portland City Code
Chapter 20.08 Permits

-Note
(New Chapter replaced by Ordinance No. 173530, effective July 30, 1999.)

20.08.010 Permits Required for Park Uses.

It is unlawful for any person to conduct or participate in any activity in a Park, for which a permit is required, unless the Parks Reservation Center has issued a permit for the activity. A permit is required for any activity in a

Park under any one or more of the following circumstances:

A. The activity is intended to involve, is reasonably likely to involve, or actually involves, as participants and/or spectators, at any one time, 150 or more persons;

B. The activity includes the placement of any temporary or permanent structure, including but not limited to any table, bench, stage, fence, tent or other facility in a Park. No permit is required under this Subsection for the placement of any temporary facility in an area of a Park which the Director has designated for such use without a permit;

C. The activity requires, or is reasonably likely to require, City services additional to those already provided to the public as a matter of course in the Park, including but not limited to: increased police or fire protection; the turning on or off of water; provision of utilities, such as gas, electricity or sewer; placing, removing, opening or closing bollards, gates or fences; or the special preparation of fields or other facilities;

D. The person or persons engaged in the activity seek to exclude, or to have the right to exclude, any member of the public from the activity or from any Park or from any area of any Park;

E. The activity is conducted in any building in any Park, except for personal use of public restrooms; or

F. The activity includes using the Park or Park area in a manner inconsistent with uses designated by the Director for that Park or Park area, or includes conduct that otherwise is prohibited in a Park, including, but not limited to, conducting business, charging admission or otherwise receiving payment for goods or services related

to the activity, or possessing, serving or consuming alcoholic beverages.

20.08.020 Applications; Reservation Center to Promulgate Policies and Procedures.

A. Any person desiring a permit under Section 20.08.010 shall apply with the Parks Reservation Center. The Parks Reservation Center, subject to the Director's approval, shall establish written policies and procedures, including but not limited to fees and standard conditions, for applications and for permits. The written policies and procedures shall be available for public inspection. Every application shall state the purpose for which the Park would be used, the date and time of the proposed use, the name of the Park, and the area thereof that would be used, the anticipated number of persons who would be present and such other information relating to the contemplated use as the Parks Reservation Center may require.

B. The Parks Reservation Center shall issue the requested permit if a complete application complying with all adopted policies and procedures is filed and all of the following conditions are met:

> **1.** The proposed activity is consistent with the size of the Park and any specialized purpose for which it is normally used, or for which specialized facilities have been provided;
>
> **2.** The proposed activity will not have an unreasonably adverse impact, from noise, litter or traffic, on the Park or on the surrounding neighborhood;

3. The proposed activity does not pose an unreasonable risk to public health or safety or to the physical integrity of the Park;

4. The applicant pays all required fees and agrees to comply with all conditions of the permit;

5. The proposed use is otherwise lawful, but nothing in this Chapter shall require the issuance of a permit for an activity otherwise prohibited by this Title;

6. The proposed activity does not conflict with an activity already scheduled for the Park or for which a different permit already has been applied for or issued for the Park;

7. The applicant, including any person, firm or corporation affiliated with the applicant and with the activity, has not failed to comply with conditions of any permit previously issued by the Parks Reservation Center.

C. The Parks Reservation Center may issue a permit for use of a Park during hours when the Park is closed if it approves the application. If the requested use does not meet the criteria of Subsection B of this Section, the Parks Reservation Center may deny the application or may impose restrictions or conditions upon the permit or issue a permit for a different date, time, Park, or Park area so as to meet such criteria. Action by the Parks Reservation Center shall be completed as quickly as reasonably possible, and, at the latest, within seven (7) days after a complete application is filed.

D. Any person whose application is denied or who is issued a permit other than as applied for or who objects to restrictions or conditions included in the permit may

appeal the matter to the Council by filing within five days after denial or inclusion of restrictions a written notice of appeal with the City Auditor. Upon receiving such a notice the City Auditor shall within 14 days schedule the appeal on the Council Calendar for hearing by the Council. At the hearing, the Council may affirm or modify the decision of the Parks Reservation Center, as the Council may deem necessary, to meet the criteria of Subsection B of this Section.

E. In determining whether the criteria of Subsection B of this Section are met, no consideration shall be given to the content of any constitutionally-protected expression connected with the planned activity. No permit shall be required under this Chapter, nor any condition imposed on any permit, if requiring a permit or imposing the condition would violate rights protected by the Constitution of the United States or by the Constitution of the State of Oregon. No permit shall be required under this Chapter in order for any person to participate in any activity programmed by or sponsored by Portland Parks and Recreation.

F. If any portion or provision of this Section is held by a court of competent jurisdiction to be invalid, such portion or provision shall, so far as possible, be held severable, and shall not affect the remainder, which shall continue in full force and effect.

20.08.030 Permits to be Exhibited.

Any person claiming to have a permit issued under this Chapter shall produce and exhibit such permit upon the request of any authorized person who may desire to inspect the same.

20.08.040 Permits Subject to Ordinances and Regulations; Indemnification.

All permits issued under this Chapter shall be subject to the City ordinances and the rules and regulations of the Parks. The persons to whom such permits are issued shall be bound by said rules, regulations, and ordinances as fully as though the same were inserted in such permits. Any person or persons to whom such permits shall be issued shall be liable for any loss, damage, or injury sustained by any person whatever by reason of the negligence of the person or persons to whom such permit shall be issued, as well as for any breach of such rules, regulations, and ordinances, to the person or persons so suffering damages or injury, and shall indemnify, defend and hold harmless the City and its officers, employees and agents from any and all claims, demands, actions and suits (including all attorney fees and costs, through trial and on appeal) arising from the permittee's use of the Park under the permit.

20.08.050 Permits Non-Transferrable.

Any permit issued under this Title shall be personal to the permittee, and shall be void if transferred or assigned in any manner, except with the written consent of the Director or the Parks Reservation Center.

20.08.060 Prohibited Conduct at Permitted Events.

(Replaced by Ordinance No. 179337, effective June 15, 2005.) In addition to any other applicable provision of law, it is unlawful for any person to engage in any of the following conduct at any event for which a permit has been issued in any Park:

A. Any conduct that substantially prevents any other person from viewing, hearing or meaningfully participating in the event.

B. Any conduct that substantially interferes with the free passage of event participants or attendees by creating an insurmountable obstacle at any entrance, aisle, walkway, stairwell, ramp, esplanade, vendor booth, ride or other area commonly used for public access, egress or ingress.

C. Using any facility, structure, fixture, improvement or other thing within the area covered by the permit in a manner contrary to or inconsistent with its intended, designated or safe use. This Subsection does not apply to any person engaged in any constitutionally protected expression, unless, and then only to the extent that, in connection with the expression, the person engages in conduct that amounts to misuses of things as proscribed by this Subsection.

D. Except as expressly provided for under the terms of the permit, lighting any fire. This prohibition does not apply to smoking devices designed for and used for smoking tobacco, in areas where such smoking is permitted.

E. Any sexual conduct, as defined under ORS 167.060, including but not limited to any physical manipulation or touching of a person's sexual organs through, over or under a person's clothing in an act of apparent sexual stimulation or gratification, regardless of the person's subjective intent.

F. Operating any bicycle, in-line skates, roller blades or other human-powered form of accelerated propulsion,

except in such places as the permittee may provide or allow for such activities.

G. Entry into the area subject to the permit without consenting to an inspection of personal belongings for the purpose of preventing the introduction of prohibited items into the event. For purposes of this Subsection, "personal belongings" includes backpacks, duffel bags, sleeping bags, purses, coolers, bulky apparel items and other personal items large enough to conceal or contain prohibited items.

H. Bringing into or possessing within the area covered by the permit any prohibited item. For purposes of this Section, "prohibited item" includes any fireworks, laser light, laser pointer, animals of any kind (except for service animals while performing their qualifying services), sound producing or reproducing or audio or video recording equipment (except as authorized by the permittee), glass bottles or containers, alcoholic beverages (except as provided by the permittee in accordance with the permit), furniture or fixtures (except as authorized by the permittee), any thing specifically designed for and presently capable of causing, or carried with the intent to threaten or cause, bodily harm to another (except for concealed handguns lawfully carried by persons in accordance with valid concealed handgun permits), and any item whose possession violates any other applicable provision of law.

I. Entry into or remaining in any area covered by any permit for any event that is not open to the public without the consent of the permittee, or entry into or remaining in any area covered by any permit for any event that is open to the public only upon the payment of an entry fee or charge, without first paying the applicable entry fee or charge.

The prohibitions contained in this Section do not apply to conduct by any Park Officer in the performance of duty, or by any person authorized to engage in that conduct in connection with the event in accordance with the permit.

20.08.070 Non-Park Use of Park Property.

Sections 20.08.010 and 20.08.020 do not apply to non-park use of Park property. Unless authorized in writing by the Director and in accordance with the terms and conditions of said written authorization and with the Council's adopted policy for the non-park use of Park property, it is unlawful for any person to make any non-park use of Park property, including but not limited to excavating for, erecting or installing or doing any act as part of or commencement of excavation, erection, or installation for, a permanent or temporary structure or facility in or on any Park.

Portland City Code

20.12.240 Rules and Regulations, Directions of Park Officers or Officers of the Bureau of Police to be Obeyed.

(Amended by Ord. No. 139010, 167262; and 168170, Oct. 5, 1994.) No person shall violate any rule or regulation established under the authority of Section 20.04.020 or 20.04.050, nor refuse a request to obey any reasonable direction of the park officers or employees or officers of the Bureau of Police. For purposes of this Section, "park officers or employees" includes any person authorized by Section 20.12.265 to issue park exclusions.

Former Portland City Code

20.08.060 Unlawful Interference.

It is unlawful for any person unreasonably to interfere with a permittee's use of a Park.

OPPOSITION BRIEF

(2)

No. 05-1480

Supreme Court, U.S.
FILED
JUN 19 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

CITY OF PORTLAND, OREGON, a municipal corporation; and PIONEER COURTHOUSE SQUARE OF PORTLAND, INC., an Oregon nonprofit corporation,

Petitioners,

v.

EDWARD GATHRIGHT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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RESPONSE TO QUESTIONS PRESENTED

The questions presented by this case are more accurately stated as follows:

1. Under this court's decisions in *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980) and *Rumsfeld v. FAIR,* 547 U.S. ___, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006), is the speech of a private citizen attending public events held in City parks under permits issued to private parties protected by the First Amendment from interference by the permittees, where the attendee has not attempted to become a participant in any organized events nor violated any duly-enacted law, ordinance or park rule?

2. Notwithstanding *Ward, Pruneyard,* and *FAIR,* does *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) require municipalities to enforce event organizers' requests to exclude attendees from their public events based solely on the content of their speech, absent evidence of violation of a duly-enacted law, ordinance or park rule?

Respondent Edward Gathright objects in particular to the City's fourth question presented as argumentative and not supported by the record in that, while sometimes loud and offensive to some, Respondent's behavior was not determined to be "abusive or disruptive" of events, as this question assumes. Those conclusions are simply Petitioners' opinion. While the District Court commented the City has the right to enact an ordinance prohibiting disruption of permitted events, there is no ordinance seeking to control disruptive behavior whose validity is being tested here.

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STATEMENT OF THE CASE

1. Introduction

In their introduction, Petitioners repeat a critical error they have made consistently throughout the proceedings – stating this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995) stands for the proposition that the First Amendment allows an event organizer "to control the message *at* the event." Petition at 2. Rather, *Hurley* determined an event organizer has the right under the First Amendment to control the message "of" its event, or "in" its event. It does not hold event organizers may eliminate the First Amendment rights of mere attendees "at" the event by exclusion from the premises. Otherwise, Gathright does not object to Petitioner's introduction.

2. Response To Factual Background

Gathright objects to numerous portions of Petitioners' factual background statement. It selectively presents Petitioners' evidence, much of which is contested, some of which is patently wrong or argumentative, and significantly, some of which was expressly rejected by the trial court. The District Court's Order granting preliminary injunction, provided in the Appendix, contains the court's findings of fact for the events that occurred in 2001 and 2002, which the court incorporated into its order granting Gathright's motion for a permanent injunction.

One example of the inaccuracy of Petitioners' factual background statement involves the Dalai Lama's visit to Portland. Petitioners imply Gathright disrupted that visit, Petition at 4, when in fact, Gathright's preaching there was confined to the preliminary stage of the event, before

the Dalai Lama arrived. Gathright's preaching did not compete with the organizers' message; it only competed with a local radio station being played over the public address system at Pioneer Square.

Another example of Petitioners' misstatement of the record concerns Gathright's exclusion and arrest at the September 22, 2001 Cascade AIDS Walk event. Petitioners state Gathright was unwelcome because he caused a "major disruption" at the same event in 2000. But the record demonstrates the disruption at the previous year's event was a physical assault upon Gathright, not by him, when another attendee objected to his message and struck him. Notwithstanding that Gathright was the victim of the assault the preceding year, he was the one arrested at that time, at the request of the same event organizers. The record shows he had to stand trial, and that he was acquitted. Petitioners correctly report Gathright was arrested and cited for criminal trespass at the September, 2001 event, but neglect to add the charge was dismissed without trial. Thus, the record shows a pattern of harassment of Gathright by the Cascade AIDS Walk event organizers, not that Gathright was breaking any law warranting his arrest.

Petitioners further accuse Gathright of disrupting the Pride Northwest Festival and Parade, which is also incorrect. The parade was nowhere near him when Gathright was preaching. His activities were confined to the festival area and nearby street, where the parade was scheduled to disband when it arrived there later. The police and event security personnel repeatedly warned Gathright he could not preach there, even in street and sidewalk areas outside the control of the event organizers. Ultimately, he was arrested as he was attempting to leave,

for trespass and failure to obey an order of a police officer. He was subsequently acquitted of both charges at a bench trial, where the judge found Gathright was attempting to obey the officers' order to leave when he was prevented by them from doing so. In dictum, the judge opined he would have acquitted Gathright on constitutional grounds, even had he refused to leave.

At the 9/11 anniversary event that was held at Pioneer Square on September 11, 2002, Gathright and the others with him did not preach at all at the Square, due to the solemn nature of the event, but rather they simply held up signs protesting abortion. They did this only on the public sidewalks surrounding Pioneer Square, and without blocking traffic. Nevertheless, they were excluded from those public sidewalks at the request of the event organizer. Only *after* the police forced them to cross the street did Gathright and the others with him then begin preaching, in protest of having been wrongfully excluded. It was only then that members of the public confronted Gathright and the others. Thus, the confrontation mentioned in Petitioners' background statement, Petition at 7, had nothing to do with their exclusion from the Pioneer Square sidewalks. Petitioners' statement about this event, and the several others just mentioned, create a very different impression than what actually occurred.

While Gathright can rightly be accused of offending some of his listeners, to do so in a public park, without breaking the law, is his right. He cannot be rightly accused of violating the law in any of these incidents, nor of "disrupting" events such that the organizers' messages were hindered. Gathright's conduct at these events was not disruptive of the expressive element of any of them, in that he did not interfere with the organizers' presenting

their messages nor prevent any attendees from fully participating. He did not seek to participate in any parades, to gain access to any podiums, nor to rent a booth at any event where booths were rented. Nor did he block ingress or egress, prevent access to vendors or to events, or break any laws. In all cases, he was a member of the public who attended the event on the same terms as any one else. He was harassed, excluded, and arrested because the content of his message was unwelcome.

Petitioners' version of the events that occurred after the permanent injunction issued is also flawed. For example, Petitioners devote pages 10-11 of their Petition to their interpretation of Gathright's behavior at "The Bite" in August, 2004. Their conclusions that he was obstructing traffic, interfering with access to vendors, and behaving offensively and disruptively simply restate their arguments to the District Court. However, after viewing the videotape of Gathright's activities at that event, the District Court expressly and summarily rejected Petitioner's conclusions. *See* Petition, App. 29.

Each event at issue in this case was open to the public. None of the permits allowed the organizer to conduct a "by invitation only" event, although such permits are available to be purchased for a much higher fee, at least at Pioneer Square. Petitioners' several statements that event organizers held "exclusive use permits" mean simply that no other organization could obtain a permit to conduct an organized activity at the same time and location, nothing more.

REASONS THE WRIT SHOULD BE DENIED.

1. This Court Has Already Rejected Petitioners' Primary Argument

Petitioners' principal argument why the court should grant their petition is to resolve a supposed lack of consistent treatment by the circuit and district courts involving one aspect of the compelled speech doctrine – whether there is a constitutionally significant difference between forcing oneself into an expressive event as an equal participant in the organizer's formal activities, as in *Hurley,* as opposed to engaging in otherwise protected speech as a mere attendee at a public event held in a public park by a private organization, as here. Petitioners' have consistently argued, and do so here, that there is no First Amendment difference between disagreeing with the organizers' message by participating *in* its event versus merely doing so *at* the event.

The District and Ninth Circuit Courts both agreed with Gathright's argument that *Hurley* stands for the proposition that the First Amendment protects an event organizer from governmental interference in the content of its own speech, but does not allow event permittees to forbid all competing speech occurring at an event, where the competing speech is not, and is not likely to be perceived as, part of the organizer's message. Thus, the Circuit Court recognized a critical distinction exists between speech likely to be perceived as part of event organizers' own message and that which is not. Petitioners reject that distinction, or alternately argue it is constitutionally irrelevant, urging a bright line rule that would give private event holders *carte blanche* to exclude any one in attendance who says something the organizer does not want heard there, whether or not other attendees are

likely to perceive it as part of the organizer's message, and regardless whether any law has been violated.

This court has at least twice addressed the limits on the First Amendment rights of forum owners to exclude competing First Amendment activities, based on the supposed perception that the competing speaker's message dilutes the protected First Amendment message of the forum's owner. In *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980) the Court observed one reason it upheld a state law requiring a shopping center owner to allow expressive activities by others on its premises:

> "The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner," and "[the owner] can expressly disavow any connection with the message by simply posting signs . . . disclaim[ing] any sponsorship of the message." 447 U.S. at 87.

Again just last term, in *Rumsfeld v. FAIR,* 547 U.S. ___, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006), the Court relied on *Pruneyard* in upholding a federal spending statute that denies federal funds to universities that refuse to provide access to military recruiters on equal terms to that provided all other employers against a First Amendment challenge by a group of law schools. The schools argued that by treating military recruiters equally with all other recruiters, their students might believe the schools approved of the military's policy banning open homosexuals from military service. In explaining that *Hurley* does not extend to the speech of outsiders that is not connected to the school's own message, Chief Justice Roberts observed for the unanimous Court:

> "Nothing about recruiting suggests that law schools agree with any speech by recruiters. We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school." (citations omitted). 547 U.S at ___, 126 S.Ct. at 1310.

That wry observation applies equally to the public at large, who, tempered by the experiences of a lifetime, are unlikely to be confused into thinking, for example, that a preacher's sermon in a public park in opposition to homosexual conduct represents the views of the Gay and Lesbian Alliance, or of any of the other event permit holders involved in this case, for that matter. Context and perceptions matter, and *Hurley* simply does not apply.

Unlike the speakers in *Grider v. Abramson*, 180 F.3d 739 (6th Cir. 1999), cited by Petitioners, Gathright never attempted to interject himself into any of the programmed activities at any of the events he attended, which attempt might be precluded by *Hurley*. Rather, he confined his activities to areas open to the public at large, and in so doing, always took care to avoid violating any laws. There was never any likelihood of his activities being perceived as part of the event organizers' own message. The District Court correctly observed:

> "Contrary to the facts in *Hurley*, plaintiff was not a participant in the permittees' events. * * * In this case, there was no danger that any member of the public would attribute plaintiff's pietistic messages to the private organizers of the events in the City parks. Plaintiff's preaching was often

> unrelated to or directly contrary to the ideas being expressed at these events. Going to an event to preach and carry signs bearing a religious message is distinct from attempting to participate in a parade or display a controversial button at a political rally." *Gathright v. City of Portland*, 315 F. Supp. 2d 1099, 1103 (D. Or. 2004), *affirmed*, 439 F.3d 573 (9th Cir. 2006).

The District Court's conclusion is in full accord with *Pruneyard* and *FAIR*, so there is nothing new for the Court to decide. If the First Amendment rights of private property owners and universities do not prohibit the government from requiring equal access be granted to their property for First Amendment activities of outsiders, in part because the owners' expressive messages will not be perceived to be diluted by the presence of competing messages, *Pruneyard* and *FAIR*, it necessarily follows from these same decisions that private parties cannot use the First Amendment as a sword to remove competing speakers from a quintessential traditional public forum – a city's parks, solely to avoid the competing message. Such speech in public parks is less likely, or certainly no more likely, to cause confusion about an event permittee's message than is leafleting in a shopping mall or recruiting at a law school.

2. There Is No Split Of Authority Among The Circuit Courts

The Sixth Circuit's decision in *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005) involves very similar facts to this case, and the Sixth Circuit reached the same result, for the same reasons, as the Ninth Circuit in this case. In *Parks*, a downtown street adjacent to the river is

closed off each year for the Columbus Arts Counsel to conduct the Columbus Arts Festival. The street remains open to general pedestrian traffic, and vendors rent booths. Mr. Parks attended the event to engage in religious expression. He did not attempt to rent a booth. He was excluded from the event by the Columbus Police Department at the request of the event organizer, although he did not appear to be disrupting the event.

The Sixth Circuit found *Hurley* did not allow the Arts Counsel to exclude Parks based on his message. In so holding, it distinguished its prior decision in *Sistrunk v. City of Strongsville,* 99 F.3d 194 (6th Cir. 1996), *cert. denied,* 520 U.S. 1251 (1997), which Petitioners have relied upon heavily throughout this litigation. *Sistrunk* involved exclusion of a dissenting attendee from a political rally in a park that was open by ticket only, to members of the Republican Party and their invitees, for collective expressive activity. 99 F.3d at 196, 198-99. Carefully distinguishing such facts from those of a street preacher at a public festival, the Circuit Court's opinion in *Parks* continued:

> "[N]othing in the record indicates that Parks interfered with or prevented [the event organizer's] 'message' from being conveyed. In fact, Parks was merely another attendee of the festival, walking up and down the street. He was at the festival neither as a vendor nor as a visual or performing artist. His speech, therefore, is not inclusionary under either the precedent of this Circuit or the Supreme Court." 395 F.3d at 651.

Thus, the Sixth and Ninth Circuits agree that the First Amendment rights of street preachers at festival events in public parks and streets are preserved when

they retain "mere attendee" status. They are the only two circuit courts that have issued reported decisions involving the competing rights of street preachers and private organizations holding public events in traditional public forums. In an analogous case, *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997), the District of Columbia Circuit Court likewise decided the National Park Service cannot bar demonstrators from sidewalks adjoining the route of Presidential inaugural parade by issuing an exclusive permit to itself to use the area. The *Babbit* court decided *Hurley* does not insulate a public agency permit holder from being required to tolerate peaceful protestors along the inaugural parade route under the circumstances. 105 F.3d at 1456.

The only other circuit court opinion cited by Petitioners as supposedly creating a split of authority is the Third Circuit's nonprecedential, unreported decision in *Diener v. Reed*, 77 Fed. Appx. 601 (3d Cir. 2003). While that case involves somewhat similar facts, in several of the events the preachers in *Diener* were arrested for violating Pennsylvania's disorderly conduct statute. The case did not involve a challenge to a city's enforcement of its grant of unfettered private-party discretion to exclude the preachers as in *Parks* and here; rather, it involved an as-applied constitutional challenge to the validity of the state disorderly conduct statute, as well as successful challenges to certain local ordinances prohibiting distribution of literature in public parks during events held under permit, and unsuccessful facial and as-applied challenges to other permitting provisions in the city's ordinances.

In rejecting the preachers' as-applied challenges to the state's disorderly conduct statute and the City's permitting scheme, the Circuit Court recited the District Court's

finding the preachers had "gone beyond legitimate First Amendment activity." 77 Fed. Appx. at 606. The District Court expressly found the preachers were not excluded due to the content of their speech, and the Court of Appeals determined its findings were not clearly erroneous. 77 Fed. Appx. at 609-10. Thus, in sharp distinction to the District Court's findings in this case and *Parks*, *Diener* is not confined to analyzing legal First Amendment expressive activity that has been prohibited solely due to a private event organizer's desire to be rid of it. Moreover, in its brief discussion of *Hurley* and *Sistrunk*, the *Diener* court failed to address the distinction between being a participant in an event and simply presenting a competing message at the event. 77 Fed. Appx. at 608-09. Thus, *Diener* is nonprecedential, it is distinguishable on the issues presented, and it is not contrary authority to the conclusions of the Sixth and Ninth Circuits that the facts at issue in *Parks* and *Gathright* are constitutionally distinguishable from those of *Hurley* .

The Ninth Circuit in this case and the Sixth Circuit in *Parks* determined the competing constitutional interests consistently with each other, and consistent with this court's subsequent decision in *Rumsfeld v. FAIR*. *Pruneyard*, *FAIR*, *Parks*, and the Ninth Circuit's opinion in this case provide the district and circuit courts with consistent and adequate authority and guidance to balance the competing interests of event organizers and attendees. There is little likelihood that any district or circuit court will disregard the analogous decisions of this Court and the on-point reported decisions of the Sixth and Ninth Circuits to reach a contrary result in any future street preacher case.

CONCLUSION

This case does not present an appropriate opportunity for the court to significantly expand upon its recent discussion of the limits of its *Hurley* rationale in *FAIR*. No circuit split needs resolution. The petition for a *writ of certiorari* to the Ninth Circuit Court of Appeals should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

EDWARD GATHRIGHT,

Plaintiff,

v.

Civil No. 03-130-HA

CITY OF PORTLAND, OREGON, and PIONEER COURTHOUSE SQUARE, INC.

OPINION AND ORDER

Defendants.

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HAGGERTY, Chief Judge:

The court heard oral argument on plaintiff's Motion for a Preliminary Injunction on March 6, 2003. For the following reasons, plaintiff's motion (Doc. #4) is granted.

BACKGROUND

Plaintiff Edward Gathright is an evangelical Christian who engages in open air preaching to members of the general public as a central part of the practice of his faith. In recent years, plaintiff has taken to preaching in various locations in the City of Portland (the City), including Pioneer Courthouse Square (the Square) and Waterfront Park. Plaintiff's preaching includes yelling and carrying signs with written religious messages. As plaintiff states in his memorandum, it is "not unusual" for people who hear plaintiff "to become upset" or "angry" at plaintiff. Indeed, plaintiff's method of delivering his message includes yelling at women, calling them "whores," "sluts," "Jezebels," "prostitutes," or "daughters of Babylon." Plaintiff prefers to speak to a large public audience, and he is therefore often present at the Square and Waterfront Park during events.

On at least six occasions when events sponsored by private organizations were taking place, defendants have forced plaintiff to remove himself from the Square and Waterfront Park under threat of arrest for trespass. When individuals designated as the "person in charge" on the organizer's City-issued permit requested that defendants remove plaintiff, plaintiff has been forced to leave the event area. The parties dispute whether defendants have forced plaintiff to leave when he was in an area outside an

event's permitted area. Plaintiff complains of the following incidents:

- On May 13, 2001, plaintiff was preaching at the Square before any of the formal activities of the NW Tibetan Cultural Association's event called the "Pathways to Peace Welcoming Festival," began. City police officers escorted plaintiff off the Square at the request of the event organizer.

- On June 17, 2001, plaintiff was preaching at the Gay Pride Festival at Waterfront Park, wearing a sandwich board sign within the event boundaries, in violation of the private rules of the organizer. The organizer issued plaintiff a private exclusion order, which the City police enforced against plaintiff.

- On September 22, 2001, plaintiff was preaching at the Square during the Cascade AIDS Project's AIDS Walk. Private security personnel employed by either the organizer or defendant Pioneer Courthouse Square used pain compliance techniques to hold plaintiff until the arrival of City police officers, who arrested plaintiff at the organizer's request.

- On June 16, 2002, plaintiff was again present during the Gay Pride Festival on a traffic island where the parade was to end a short time later, saying such things as "you're going to die" and "homos have to die." Ex. L to Auerbach Aff. City police told plaintiff to leave. Plaintiff returned to the brick sidewalk of Waterfront Park, which he claims was outside the event area. Plaintiff was eventually arrested for trespass when the police gave him five seconds to leave but arrested him after only two seconds.

- On August 24, 2002, plaintiff preached outside the fenced beer garden area on the sidewalk of the Square during the Fiesta Italiano. Again, plaintiff was ordered to leave under threat of arrest for trespass.

- On September 11, 2002, plaintiff and others (including DeParrie) were preaching on the sidewalk at the Square during a September 11 anniversary event – the "Evening of Remembrance" – sponsored by the United Way of the Columbia Willamette. A City police officer ordered the preachers to walk across the street to preach there at the behest of the event organizer.

Plaintiff alleges violations of his constitutional rights and seeks a preliminary injunction to enjoin ejection of him and similarly situated individuals from future events.

STANDARDS

The standard for granting a preliminary injunction in the Ninth Circuit is well-settled. The court considers:

> (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief. The moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.

Miller v. California Pac. Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994) (citations omitted).

ANALYSIS

Plaintiff's Motion for a Preliminary Injunction seeks to enjoin defendants from: (1) excluding plaintiff from any public street or park, absent probable cause to believe a violation of an Oregon statute, a valid City of Portland ordinance, or a valid City of Portland park rule has occurred; (2) advising permittees that they lack the authority to exclude plaintiff or others similarly situated from attending events, absent probable cause to believe such a violation has occurred; (3) further enforcement of City Ordinance 20.08.060, which may have been at issue when plaintiff was ejected; and (4) excluding plaintiff and others similarly situated for violation of private event rules in parks that are open to the public.

As defendants point out, plaintiff's motions #1 and #2 are superfluous because neither defendants nor plaintiff believes that defendants have the authority to exclude plaintiff from private events absent probable cause that he is violating a law, ordinance, or park rule. *See, e.g.*, Ex. O to Auerbach Aff. at 11 (incident report for harassment in which plaintiff and others pushed and threatened fair booth operators). The parties simply disagree over what behavior constitutes "probable cause." Defendants believe that if plaintiff disobeys a permittee's request to leave an event – a request that could be based on the content of plaintiff's speech or plaintiff's violation of rules of conduct issued by the private permittee – defendants have probable cause to arrest plaintiff for criminal trespass. *See* Or. Rev. Stat. § 164.205(3)(b) (defining criminal trespass as the failure to leave premises that are open to the public after being lawfully directed to leave by the person designated as "in charge" on the permit).

Further, defendants argue that plaintiff's motion #3 – to enjoin enforcement of City Ordinance 20.08.060, entitled "Unlawful Interference" – is unnecessary because the ordinance is not the source of defendants' authority to exclude plaintiff from public events. The ordinance states, "It is unlawful for any person unreasonably to interfere with a permittee's use of a Park." Instead, defendants argue that their authority to exclude plaintiff arises when permittees "lawfully direct" persons to leave their events. The failure to obey such a "lawful direction" constitutes criminal trespass under Or. Rev. Stat. § 164.205(3)(b). Defendants believe that a permit gives permittees the right to control the speech within their event area, so permittees' directions to plaintiff to leave their event because of his speech is necessarily lawful.

Accordingly, the issue to be decided is whether defendants' enforcement of private event organizers' wishes to eject plaintiff, based on the content or manner of plaintiff's speech, from event that are open to the public and held on public property, violates plaintiff's First Amendment right to free speech.

1. The Merits

Waterfront Park and the Square are public parks – "quintessential public forums." *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 802-03 (1989)). When a private organization obtains a permit to use these public forums, the issuance of the permit does not change their nature. The special policy concerns that justify heightened protection of public forums from free speech restrictions are not affected by who has or does not have a permit. *See*

United States Postal Serv. v. Council of Greenburg Civic Associations, 453 U.S. 114, 133 (1981) ("Congress, no more than a suburban township, may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums."); *Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208 (N.D. Ohio 1995) ("The Commons *remained* a public forum during its use, pursuant to the permit. . . . ") (emphasis in original); *Irish Subcomm. v. Rhode Island Heritage Comm'n*, 646 F. Supp. 347, 354 n.3 (D.R.I. 1986) ("I cannot accept that the government may so easily alter the character of public forum property by restricting the use of part of the public forum.").

Because Waterfront Park and the Square are public forums, the court must evaluate whether defendants' enforcement of private event organizers' wishes to eject plaintiff is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. *See Grossman*, 33 F. 3d at 1204. Defendants' policy of allowing private organizations to decide whose speech may be heard at their events is content-neutral. In plaintiff's case, defendants did not eject him from the events because of any message plaintiff conveys with which defendants disagree. *See Ward*, 491 U.S. at 791. Instead, permittees "lawfully direct" persons to leave their events, and defendants enforce all permittees' directions in this regard equally. Or. Rev. Stat. § 164.205(3)(b). Although private permittees are in fact requesting defendants to remove plaintiff from the permitted areas based upon the content of his speech, plaintiff has alleged no facts suggesting defendants are more willing to eject plaintiff based upon the content of plaintiff's speech. For example, if plaintiff obtained a

permit to preach his views in the Square, plaintiff can point to no evidence that defendants would fail to carry out his request to remove persons from his event.

Second, defendants must show that their enforcement policy serves a significant government interest. Defendants assert that the government has a significant interest in protecting the free speech rights of people and organizations who have obtained permits to use a public park. Defendants rely upon *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, in which the Supreme Court held that Massachusetts may not "require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." 515 U.S. 557, 559 (1995). In that case, Massachusetts law would have forced parade organizers to allow gay, lesbian, and bisexuals expressing their Irish and gay heritage to march in the parade. Similarly, the Sixth Circuit has held that a private political organization holding a rally in public commons for one political candidate may prevent attendees from wearing a rival political candidate's campaign button at the rally. *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1997).

Defendants argue that private permittees' ability to exclude people like plaintiff from preaching a different message from theirs is necessary to protect the permittees' "autonomy to choose the content of [their] own message." *Id.* at 573. In both *Hurley* and *Sistrunk*, however, the act of including messages contrary to the private event organizers' wishes would have necessarily changed the organizers' message. Attendees at the parade would have assumed the event organizers sympathized or approved of the views presented by the gay marchers. *Hurley*, 515 U.S. at 574-75. Viewers of the political rally would not have as

strongly received the message the event organizers wished to convey – that their candidate would win – if rival political buttons were worn by attendees. *Sistrunk*, 99 F.3d at 199. The circumstances of plaintiff's speech are distinguishable because their is no danger here of any member of the public attributing plaintiff's message to the private organizers of events in City parks. His preaching is often unrelated or directly contrary to the ideas being expressed at these events.

Nevertheless, defendant's interest in protecting the free speech rights of permittees is significant. Preventing permittees from ejecting those whose speech disrupts their message would require, in essence, that permittees make space within their event for the dissemination of plaintiff's message. Although plaintiff would have been denied a permit to hold an event of his own at the same time and place as the events at issue in this case, he argues that he should be allowed to use the space for his speech anyway. Such a result would make permittees wonder why they bothered applying for a permit in the first place. *See Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208, 1219 (N.D. Ohio 1995) (upholding the defendants' implementation and enforcement of its permit system because without it, "the First Amendment rights of all citizens – including plaintiffs – could easily be lost in the noise."). Enough people preaching their own individual messages at a public event destroys a permittees' ability to hold any event whatsoever. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 653 (1981) (discussing the cumulative impacts of the respondents' arguments). Defendants' method of granting and enforcing permits guarantees permittees that, at least within the permitted area, they need not compete with others to be heard. In

this way, defendant's policy protects the free speech rights of the permittees. *See Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.").

Defendants' enforcement scheme must fail, however, because it is not narrowly tailored to burden no more speech than is necessary. As explained above, the significant government interest advanced by defendant's permitting scheme is the protection of permittees' free speech rights, which could be overwhelmed by individuals who are disruptive, either on their own or when viewed cumulatively with other speakers. Nowhere, however, does the City ensure that individuals are ejected solely for the disruptiveness of their speech. In fact, defendants argue that a private permittee may issue rules for its event for defendants to enforce that expressly condition attendance on speech that conforms to its rules. Further, defendants contend that a private permittee may simply direct someone to leave who displays or voices a message with which the organizer disagrees. This is not the case. Unlike the parade marchers discussed in *Hurley* and political rally participants analyzed in *Sistrunk*, attendees of ordinary public events held on public property may be excluded only if their speech in fact interferes with the ability of the event organizer to hold its event.

The criminal trespass statute defines trespass as failing to honor a permittee's "lawful direction" to leave an event, but fails to define "lawful." Or. Rev. Stat. § 164.205(3)(b). A permittee's direction to leave a public event would be "lawful" only if plaintiff's speech were in fact disruptive. The officer charged with enforcing the

criminal trespass statute, however, is not given this guidance, nor are permittees given information in their permits outlining "lawful" reasons they may eject attendees from their events based on the attendees' speech. *See* Auerbach Aff. Ex. A-F. One could imagine next year's Gay Pride event, where the organizers recognize plaintiff from his prior years' disruptions and preemptively request the police to remove plaintiff from the event. Under defendant's scheme, the police are given no tools with which to evaluate whether plaintiff may be so excluded. Further, an especially sensitive event organizer might, under the current scheme, eject speakers before anyone in attendance notices them in any fashion.

The court notes that City Ordinance 20.08.060, entitled "Unlawful Interference," does not provide the guidance lacking in the general criminal trespass statute. The Ordinance prevented "any person" from "unreasonably" interfering with a permittee's use of a park. City Code 20.08.060; *see also City of Portland v. Daniel John Lee*, Multnomah County Case No. 9907-46965 (November 22, 1999). The Ordinance fails to define what constitutes "unreasonable" interference, however, and it lacks, for example, any geographical boundary. If enforced, its terms would prevent a counter-protest organized across the street from a political rally or at any location from which the sound or message conveyed could disrupt an event. The Ordinance does not provide the type of guidance necessary to show that defendant's permitting scheme is narrowly tailored to advance the significant government interest it serves.

2. Balance of the Hardships

Plaintiff must demonstrate at least a fair chance of success on the merits to be entitled to a preliminary injunction. *Miller*, 19 F.3d at 456. The court finds that plaintiff has met his burden, so a balance of the hardships is necessary.

The loss of First Amendment freedom, "even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). When a plaintiff has shown probable success on the merits, the balance of hardships tips sharply in his or her favor. *Sammartano v. First Judicial Court, in and for the County of Carson City,* 303 F. 3d 959, 973 (9th Cir. 2002). Defendants have made no showing of irreparable harm were a preliminary injunction to be granted. Accordingly, the court finds that plaintiff has demonstrated irreparable injury to entitle him to a preliminary injunction.

CONCLUSION

For the foregoing reasons, plaintiff's Motion for a Preliminary Injunction and a Waiver of Security (Doc. #4) is GRANTED. Defendants are enjoined from ejecting plaintiff and other similarly situated individuals from public events by threat of arrest for criminal trespass, as trespass is defined in Or. Rev. Stat. § 164.205(3)(b), unless there is probable cause to believe they have violated a valid statute, City ordinance, or park regulation.

IT IS SO ORDERED.

DATED this 23 day of April, 2003.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge